Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1993

JAMES B. BEAM DISTILLING CO.,

Petitioner,

v.

STATE OF GEORGIA; JOE FRANK HARRIS, individually; ZELL MILLER, individually and as Governor of the State of Georgia; MARCUS E. COLLINS, individually and as Georgia State Revenue Commissioner; and CLAUDE L. VICKERS, individually and as Director of the Fiscal Division of the Department of Administrative Services,

Respondents.

On Petition for Writ of Certiorari To The Supreme Court of Georgia

PETITION FOR WRIT OF CERTIORARI

Counsel of Record:

MORTON SIEGEL
SIEGEL, MOSES, SCHOENSTADT & WEBSTER
10 East Huron
Chicago, Illinois 60611
Telephone: 312/664-8998

JOHN L. TAYLOR, JR.
CELESTE MCCOLLOUGH
MATTHEW L. HESS
JEFFERY T. COLEMAN
VINCENT, CHOREY, TAYLOR & FEIL
A Professional Corporation
The Lenox Building, Suite 1700
3399 Peachtree Road, N.E.
Atlanta, Georgia 30326
Telephone: 404/841-3200

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QUESTION PRESENTED FOR REVIEW

Whether the decision of the court below conflicts with the applicable due process decisions of this Court as enunciated in *Harper v. Virginia Dept. of Taxation*, 509 U.S. ___, 113 S. Ct. 2510 (1993); *McKesson Corp. v. Division of Alcoholic Beverages and Tobacco, Dept. of Business Regulation of Florida*, 496 U.S. 18, 110 S. Ct. 2238 (1990); *Brinkerhoff-Faris Trust and Savings Co. v. Hill*, 281 U.S. 673, 50 S. Ct. 451 (1930); *Ward v. Board of County Comm'rs*, 253 U.S. 17, 40 S. Ct. 419 (1920); and *Atchison, Topeka & Santa Fe Ry. v. O'Connor*, 223 U.S. 280, 32 S. Ct. 216 (1912), by

I) denying any retrospective relief under the State's refund statute or otherwise for taxes held by this Court to have been collected pursuant to an unconstitutional statute; and

II) adopting the State's after-the-fact assertion of available predeprivation remedies in conflict with the State's prior acknowledgments in this case and elsewhere of the availability of the refund statute, and in reliance upon so-called predeprivation remedies which did not remove the State-created duress upon the Petitioner to pay the unconstitutional taxes at issue in advance by purchasing tax stamps and affixing them to the Petitioner's product before shipment of the product into the State.[1]

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[1] The decision of the Georgia Supreme Court in the instant action was rendered simultaneously with its decision in *Reich v. Collins*, ___ Ga. ___, ___ S.E.2d ___, 1993 WL 503247 (1993) (Appendix K). The decision subject to review here is based at least in part on the Georgia Supreme Court's decision in *Reich. Reich*, which is based at least in part on the decision in the instant action, is also currently the subject of a pending petition for writ of certiorari in U.S.S.Ct. case no. 93-908.

TABLE OF CONTENTS

Page

OPINIONS DELIVERED IN THE CASE 1

JURISDICTION 1

CONSTITUTIONAL PROVISIONS AND STATUTES... 1

STATEMENT OF THE CASE 2

CURRENT EVENTS IN GEORGIA RELATED TO TAXPAYER RELIEF 11

ARGUMENT AND CITATION OF AUTHORITY 12

I. THE DECISION OF THE GEORGIA SUPREME COURT DIRECTLY CONTRADICTS THE APPLICABLE DECISIONS OF THIS COURT CONSTRUING THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT TO REQUIRE STATES TO GRANT TAXPAYERS A CLEAR AND CERTAIN REMEDY EITHER PRIOR TO OR AFTER THE PAYMENT OF UNCONSTITUTIONAL TAXES 12

A. To Qualify, Due Process Requires the Remedy 1) to Have Been Clear and Certain, 2) if not retroactive, to Have Been a Predeprivation or Prospective Remedy, and 3) if not retroactive, to Have Been a Duress-Free Remedy 12

B. No Retrospective or Postdeprivation Remedy.. 16

C. No Constitutionally Adequate Predeprivation Remedy 18

1. Not Duress-Free 18

2. Not Clear and Certain 23

TABLE OF CONTENTS – Continued

Page

a. From 1982 through 1984, When the Taxes at Issue Were Paid, Georgia Law Clearly and Certainly Pointed the Petitioner *Only* in the Direction of the Refund Statute 23

b. Additionally not Clear and Certain Because a Ruling on the Constitutionality of the Tax Was Unavailable Under the Administrative Remedies... 26

c. A Suit for Declaratory/Injunctive Relief was not a Clear and Certain Remedy Available to the Petitioner.. 27

CONCLUSION 29

TABLE OF AUTHORITIES

Page

I. United States Constitution

U.S. Const. amend. XIV ..... *passim*

U.S. Const. art. I 1

U.S. Const. art. VI 1

II. Statutes

28 U.S.C. § 1257 1

Fla. Rule Civ. Pro. 1.610 28

Fla. Stat. § 86.011 28

O.C.G.A. § 3-1-4 19

O.C.G.A. § 3-2-3 19

O.C.G.A. § 3-2-11 ..... 10, 20, 21, 22

O.C.G.A. § 3-2-12 21

O.C.G.A. § 3-2-33 19

O.C.G.A. § 3-2-34 19

O.C.G.A. § 3-2-36 19

O.C.G.A. § 3-3-1 19

O.C.G.A. § 3-3-3 19

O.C.G.A. § 3-3-9 19

O.C.G.A. § 3-3-27 19

O.C.G.A. § 3-3-29 19

O.C.G.A. § 3-4-60 ..... 2, 10

O.C.G.A. § 3-4-61 ..... 2, 8

TABLE OF AUTHORITIES – Continued

Page

O.C.G.A. § 9-4-1 ..... 10, 22, 27

O.C.G.A. § 9-4-2 29

O.C.G.A. § 9-5-8 ..... 22, 27

O.C.G.A. § 9-11-65 ..... 10, 22, 27

O.C.G.A. § 48-1-25 25

O.C.G.A. § 48-2-35 ..... 4, 23, 25, 27

O.C.G.A. § 48-2-40 ..... 20, 21

O.C.G.A. § 48-2-44 ..... 20, 21

O.C.G.A. § 48-2-54 ..... 10, 22, 26

O.C.G.A. § 48-2-59 20

O.C.G.A. § 50-13-11 ..... 10, 26

O.C.G.A. § 50-13-12 ..... 10, 22, 26

III. REGULATIONS OF THE STATE OF GEORGIA

Georgia Revenue Rule § 560-2-3-.09 18

IV. DECISIONS OF THE UNITED STATES SUPREME COURT

Atchison, Topeka & Santa Fe Ry. v. O'Connor, 223 U.S. 280, 32 S. Ct. 216 (1912) 12, 13, 15, 20, 23

Bacchus Imports v. Dias, 468 U.S. 263, 104 S. Ct. 3049 (1984) 3

Brinkerhoff-Faris Trust and Savings Co. v. Hill, 281 U.S. 673, 50 S. Ct. 451 (1930) 25

Davis v. Michigan Dept. of Treasury, 489 U.S. 803, 109 S. Ct. 1500 (1989) 6

TABLE OF AUTHORITIES – Continued

Page

Harper v. Virginia Department of Taxation, 509 U.S. ___, 113 S. Ct. 2510 (1993) 6, 9, 15, 16

James B. Beam Distilling Co. v. State, 501 U.S. ___, 111 S. Ct. 2439 (1991) 1

Matthews v. Eldridge, 424 U.S. 319, 96 S. Ct. 893 (1976) 15

McKesson Corp. v. Division of Alcoholic Beverages and Tobacco, Dept. of Business Regulation of Florida, 496 U.S. 18, 110 S. Ct. 2238 (1990) ..... *passim*

Reich v. Collins, 509 U.S. ___, 113 S. Ct. 3028 (1993) 5

Testa v. Katt, 330 U.S. 386, 67 S. Ct. 810 (1947) 25

Ward v. Board of County Comm'rs, 253 U.S. 17, 40 S. Ct. 419 (1920) 25

V. Other Decisions

Apostolic Overcoming Holy Church of God v. Davis, 228 Ga. 36, 183 S.E.2d 745 (1971) 22, 27

Atlanta Americana Motor Hotel Corp. v. Undercofler, 222 Ga. 295, 149 S.E.2d 691 (1966) 25

Barber v. Collins, 201 Ga. App. 104, 410 S.E.2d 444 (1991) 24

Beck v. Glaze, 230 Ga. 593, 198 S.E.2d 283 (1973). . 22, 27

Benton v. Gwinnett County Bd. of Educ., Ga. App. 533, 309 S.E.2d 680 (1983) 29

Blackmon v. Premium Oil Stations, Inc., 129 Ga. App. 169, 198 S.E.2d 900 (1973) 25

Brogdon v. State Bd. of Veterinary Medicine, 244 Ga. 780, 262 S.E.2d 56 (1979) 29

TABLE OF AUTHORITIES – Continued

Page

Cantrell v. Henry County, 250 Ga. 822, 301 S.E.2d 870 (1983) 29

Carpenters Local Union No. 3024 v. United Broth. of Carpenters and Joiners of America, 220 Ga. 596, 140 S.E.2d 876 (1965) 22, 27

Collins v. Waldron, 259 Ga. 582, 385 S.E.2d 74 (1989) 24, 28

Davies v. Curry, 230 Ga. 190, 196 S.E.2d 382 (1973) 22

Eimco BSP Services Co. v. Chilivis, 241 Ga. 263, 244 S.E.2d 829 (1978) 25

Flint River Mills v. Henry, 234 Ga. 385, 216 S.E.2d 895 (1975) 27

George v. Department of Natural Resources, 250 Ga. 491, 299 S.E.2d 556 (1983) 26, 29

Georgia Pub. Serv. Comm'n v. Southern Bell, 254 Ga. 244, 327 S.E.2d 726 (1985) 29

Guice v. Pope, 229 Ga. 136, 189 S.E.2d 424 (1972) 29

Hawes v. Smith, 120 Ga. App. 158, 169 S.E.2d 823 (1969) 24

Henderson v. Carter, 229 Ga. 876, 195 S.E.2d 4 (1972) 29

Ingalls Iron Works Co. v. Blackmon, 133 Ga. App. 164, 210 S.E.2d 377 (1977) 24

James B. Beam Distilling Co. v. State, ___ Ga. ___, ___ S.E.2d ___, 1993 WL 503244 (Dec. 2 1993) 1, 7, 16, 17

James B. Beam Distilling Co. v. State, 259 Ga. 363, 382 S.E.2d 95 (1989) 1, 3, 4

TABLE OF AUTHORITIES – Continued

Page

Ledford v. Department of Transp., 253 Ga. 717, 324 S.E.2d 470 (1985) 27

Marconi Avionics, Inc. v. DeKalb County, 165 Ga. App. 628, 302 S.E.2d 384 (1983) 24

Newsome v. Brown, 252 Ga. 421, 314 S.E.2d 225 (1984) 29

Reich v. Collins, ___ Ga. ___, ___ S.E.2d ___, 1993 WL 503247 (Dec. 2, 1993) ..... *passim*

Reich v. Collins, 262 Ga. 625, 422 S.E.2d 846 (1992) ..*passim*

Rybert & Co. v. City of Atlanta, 258 Ga. 347, 368 S.E.2d 739 (1988) 29

Schieffelin & Co. v. Strickland, 253 Ga. 385, 320 S.E.2d 358 (1984) 29

Shippen v. Folsom, 200 Ga. 58, 35 S.E.2d 915 (1945) 29

State of Georgia v. Private Truck Counsel of Am., Inc., 258 Ga. 531, 371 S.E.2d 378 (1988) 8, 24

Wright v. Forrester, 192 Ga. 864, 16 S.E.2d 873 (1941) 29

OPINIONS DELIVERED IN THE CASE

This Petition for Writ of Certiorari is based upon the decision rendered by the Supreme Court of the State of Georgia on December 2, 1993, reported at ___ Ga. ___, ___ S.E.2d ___, 1993 WL 503244 (Dec. 1993) (sometimes "*Beam* (Ga.II)") (Appendix A). The Georgia Supreme Court affirmed the unpublished decisions of the Superior Court of Fulton County, State of Georgia, entered on February 11, 1993 (Appendix B) and April 6, 1993 (Appendix C). The decision of this Court in *James B. Beam Distilling Co. v. State* is reported at 501 U.S. ___, 111 S. Ct. 2439 (1991) (sometimes "*Beam* (U.S.I)") (Appendix D). The decision of the Georgia Supreme Court entered in 1989 is reported at 259 Ga. 363, 382 S.E.2d 95 (1989) (sometimes "*Beam* (Ga. I)") (Appendix E). In *Beam* (Ga. I), the Georgia Supreme Court affirmed the unpublished decision of the Superior Court of Fulton County, State of Georgia dated May 27, 1988 (Appendix F).

JURISDICTION

The judgment of the Supreme Court of the State of Georgia in *Beam* (Ga. II) was entered on December 2, 1993, and jurisdiction is conferred upon this Court under 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISIONS AND STATUTES

The Federal constitutional provisions and statutes involved in this case are the Supremacy Clause of the United States Constitution, U.S. Const. art. VI; the Commerce Clause of the United States Constitution, U.S. Const. art. I, § 8, cl. 3; the Due Process Clause of the Fourteenth Amendment to the United States Constitution, U.S. Const. amend. 14, § 1; and the Equal Protection

Clause of the Fourteenth Amendment to the United States Constitution, U.S. Const. amend. 14, § 1, all of which are set out in full in Appendices G, H, I and J.

STATEMENT OF THE CASE

The Petitioner, a Delaware corporation, produces and imports alcoholic beverages into the State of Georgia and engages in business in interstate commerce throughout the United States. As a condition to selling alcoholic beverages to Georgia wholesalers, the Petitioner, during the time period relevant to this action (1982 through 1984), was compelled under the then current versions of O.C.G.A. §§ 3-4-60 (the "Tax Statute" (Appendix EE))[2] and 3-4-61 (the "Stamp Statute" (Appendix FF))[3] to pre-pay the applicable Georgia excise taxes by purchasing stamps in proper denominations denoting the prior payment of taxes and affixing these stamps to each bottle or container of alcoholic beverages prior to their shipment into Georgia.

The Tax Statute, held by this Court to have been unconstitutional in *Beam* (U.S. I), imposed a tax upon imported alcoholic beverages at twice the rate imposed upon the same beverages produced in Georgia from Georgia-grown products. Having paid the higher taxes, the Petitioner (like all local and out-of-state producers)

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[2] In 1985, the Georgia General Assembly facially amended O.C.G.A. § 3-4-60.

[3] In 1992, the Georgia General Assembly amended O.C.G.A. § 3-4-61. As of February 1993, suppliers of distilled spirits and alcohol are no longer required to purchase and affix stamps to their products.

invoiced the amount of the tax to the Petitioner's wholesalers, thereby increasing the shelf price of the Petitioner's products. The effect was that the shelf price of the Petitioner's products was higher because of the tax than the shelf price of the Petitioner's local Georgia competitors. Thus, in the words of this Court in a practically identical case involving a discriminatory alcohol tax violative of the Commerce Clause, the

> *tax injured petitioner not only because* it left petitioner poorer in an absolute sense than before (a problem that might be rectified to the extent petitioner passed on the economic incidence of the tax to others), but also because *it placed petitioner at a relative disadvantage in the marketplace vis-á-vis competitors* distributing preferred local products.

McKesson Corp. v. Division of Alcoholic Beverages and Tobacco, Dept. of Business Regulation of Florida, 496 U.S. 18, 110 S. Ct. 2238, 2256 (1990) (emphasis supplied). Hence, "[E]ven if the tax [was] completely and successfully passed on, it increase[d] the price of [petitioner's] products as compared to the exempted beverages." *Id.*, 110 S. Ct. at 2256 (quoting *Bacchus Imports v. Dias*, 468 U.S. 263, 267, 104 S. Ct. 3049, 3053 (1984)).

In *Beam* (U.S. I) in June of 1991, this Court held in this case that the holding of *Bacchus, id.*, must be applied retroactively to the taxes paid by the Petitioner during the years in question (1982-1984). 111 S. Ct. at 2441. In other words, under the Tax Statute, the State of Georgia collected $2,252,096.75 from the Petitioner in violation of the Commerce Clause of the United States Constitution. In so holding, this Court reversed the *Beam* (Ga. I) decision of the Georgia Supreme Court and remanded the case to the Georgia courts for further proceedings consistent with its decision. *Id.* at 2441 and 2448. As will be

shown below, however, in contravention of the decisions of this Court, the Respondents and the courts of Georgia intentionally adopted a course of action to deprive the Petitioner of its constitutional rights.

From 1985 when the Petitioner filed its administrative claims for refund under Georgia's refund statute, O.C.G.A. § 48-2-35 (the "Refund Statute"; Appendix MM[4]) until this Court's 1991 decision in *Beam* (U.S. I), everyone involved in the case, including the Petitioner, the State of Georgia and its officials (Respondents herein), the Superior Court of Fulton County, and the Georgia Supreme Court, agreed that Georgia's Refund Statute was the remedy available to the Petitioner if and only if the Petitioner established that the taxes collected from it in 1982 through 1984 violated the Commerce Clause. Neither the Respondents nor the Georgia courts ever suggested that the Petitioner either had no standing to seek a refund or had not followed the proper procedure for obtaining a refund. Thus, for instance, prior to this Court's holding that the taxes at issue violated the Commerce Clause, the Georgia Supreme Court held in *Beam* (Ga. I) that if the tax statute was unconstitutional at the time the taxes were paid, then "Georgia [would face] liability for over 30 million dollars[5] in *refunds . . . . Georgia would have to refund large sums of money that it has already spent.*" 382 S.E.2d at 95, 97 (emphasis supplied). Moreover, prior to this Court's decision in *Beam* (U.S. I),

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[4] In 1992, the Georgia General Assembly amended the refund statute to exclude claims related to alcoholic beverages tax payments.

[5] The court calculated this figure by lumping Petitioners' claims with other claims asserted by other taxpayers aggrieved under the Tax Statute.

the Respondents expressly admitted in judicio and elsewhere that the Refund Statute provided the Petitioner the proper remedy and that no pre-payment protest was required. These admissions included, but were not limited to, representations made to this Court at oral argument.

Nevertheless, once this Court held in *Beam* (U.S. I) that the taxes at issue were collected illegally, the State of Georgia, through the Respondents herein and the courts, embarked upon a course of action designed to deny any remedy whatsoever to this Petitioner and thousands of other Georgia taxpayers who had paid taxes that were illegal under Federal law.[6] First, the Respondents upon remand from this Court amended their Answer, raising for the first time numerous procedural defenses, including claims that the Refund Statute was inapplicable, that the Petitioner lacked standing to seek a refund, and that the Petitioner should have availed itself of a plethora of so-called "predeprivation" remedies.

Then, while the Superior Court for Fulton County had cross-motions for summary judgment under advisement in the case at bar, the Georgia Supreme Court issued its decision in *Reich v. Collins*, 262 Ga. 625, 422 S.E.2d 846 (1992) (*Reich I*) (Appendix L), *vacated and remanded*, 509 U.S. ___, 113 S. Ct. 3028 (1993), *on remand*, ___ Ga. ___, ___ S.E.2d ___, 1993 WL 503247 (Dec. 2, 1993) (*Reich II*) (Appendix K), *cert. petition pending*. *Reich* involved claims for refund by Federal retirees for taxes collected from

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[6] Federal retirees in Georgia who paid income taxes as a result of illegal discrimination between state retirees and Federal retirees have pursued refunds in certain actions that have progressed through the courts during the same time frame as the instant lawsuit. *See* Petition for Writ of Certiorari filed this Term in *Reich v. Collins*, U.S.S.Ct. case no. 93-908.

them illegally under the principles of *Davis v. Michigan Dept. of Treasury*, 489 U.S. 803, 109 S. Ct. 1500 (1989). In *Reich I* (Appendix L), the Georgia Supreme Court, in an unprecedented holding which overruled prior case law, held for the first time (1) that Georgia's Refund Statute (Appendix MM) *"does not address the situation where the law under which the taxes are assessed and collected is itself subsequently declared to be unconstitutional* or otherwise invalid." 422 S.E.2d at 849 (emphasis supplied), and (2) in order to recover payment of an unconstitutional tax, a taxpayer must first (a) file a protest and (b) demand a refund before or at the time the tax is paid. The Georgia Supreme Court cited no statutory or other authority for either proposition.[7] Clearly the court was attempting to legislate at this point.

In light of these developments, the Petitioner amended its Complaint to allege specifically that denial of relief would violate the Supremacy Clause, the Fourteenth Amendment Due Process Clause and the Fourteenth Amendment Equal Protection Clauses of the Constitution of the United States. (Appendices M, N and O). Following the issuance of the Georgia Supreme Court's 1992 *Reich I* decision and citing *Reich I*, the Superior Court of Fulton County on February 11, 1993 entered its Order denying the Petitioner's claim for refund under the Refund Statute and held that the denial of the claim did not violate the Due Process Clause (Appendix B). On

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[7] As noted in the citation, this Court vacated and remanded the Georgia Supreme Court's decision in *Reich I*. This Court cited its decision in *Harper v. Virginia Department of Taxation*, 509 U.S. ___, 113 S. Ct. 2510 (1993), as the basis for the remand. The taxpayer in *Reich* currently has a petition for writ of certiorari pending in this Court. U.S.S.Ct. case no. 93-908.

April 6, 1993, the Superior Court of Fulton County further entered summary judgment against all of the Petitioner's claims under the U.S. Constitution (Appendix C).

On December 2, 1993, the Georgia Supreme Court issued its decision upon which this Petition is based. On the same day, the court issued its decision following remand from this Court in *Reich II*. The court did not revisit or comment upon its earlier decision in *Reich I* that the Refund Statute does not provide a remedy for unconstitutionally collected taxes. The court likewise did not revisit or comment upon its earlier decision in *Reich I* that a taxpayer, in order to obtain relief, must file a protest and demand for refund at the time of payment of a tax later determined to be unconstitutional. The only possible reading of these cases, however, is that the court affirmed these prior holdings. The taxpayer in *Reich* was granted no relief under the Refund Statute, and the court gave no other explanation for denying the *Reich* taxpayer relief under the Refund Statute. The court held that the Federal retirees were additionally not entitled to any relief under the Due Process Clause of the Fourteenth Amendment because they had failed to avail themselves of certain so-called "predeprivation" remedies. The court cited its decision in this case of the same day, *Beam* (Ga. II), for this holding. Paradoxically, in holding that the *Reich* taxpayer should have availed itself of certain predeprivation remedies, the court ignored the new protest and demand procedure announced in *Reich I*, and pointed only to other so-called predeprivation remedies discussed in detail below.

In this case, the Georgia Supreme Court, despite its holdings to the contrary in *Reich I* and *II* and without explanation, "assum[ed] that [the Refund Statute] *may be* an appropriate means by which one may seek a refund of

taxes paid pursuant to a statute subsequently declared unconstitutional." Appendix A, p. A2 n.3 (emphasis supplied). The following cite was offered as the sole support for this equivocation: "See *State of Georgia v. Private Truck Council &c.* [sic], 258 Ga. 531 (371 SE2d 378) (1988) [confirming the availability of the Refund Statute for constitutional claims]. But see *Reich v. Collins*, 262 Ga. 625 (422 SE2d 826) (1992) [retracting the availability of the Refund Statute for constitutional claims]." Appendix A, pp. A2-A3 n.3.

> The Georgia Supreme Court acknowledged that [b]y *requiring* the stamps denoting payment of the tax to be affixed by the manufacturer or the wholesaler to each bottle or container of distilled spirits *before shipment* to any retailer (OCGA § 3-4-61(2) (1982) [the Stamp Statute]), the General Assembly expressed its intent that the excise tax be *paid before* the product was made available for purchase by the consuming public.

Appendix A, pp. A3-A4 (emphasis supplied, footnote omitted). The court then held that under Georgia law, the Petitioner could not avail itself of the Refund Statute [held in *Reich I* and *II* to be unavailable for redressing constitutional claims in any event] because it invoiced to the Petitioner's wholesalers the amount of the taxes paid by the Petitioner. Thus, the very event held by this Court (the so-called "pass-on") to inflict the unconstitutional injury upon a taxpayer in the Petitioner's position by disadvantaging the taxpayer's products vis-á-vis local, preferred competitors, *McKesson*, 110 S. Ct. at 2256, was used by the Georgia Supreme Court in total disregard of this Court's decisions to deny relief to the Petitioner under a statutory remedy already held by that very same

Georgia court to be unavailable for redress of constitutional claims.

With curious semantics, the Georgia Supreme Court stated its next holding:

> Even assuming that [the Petitioner] was not procedurally barred from seeking a refund under [the Refund Statute], federal due process, as interpreted by the Supreme Court in [*McKesson* and *Harper v. Virginia Dept. of Taxation*, 509 U.S. [___, 113 S. Ct. 2510 (1993)]], does not require that the State of Georgia refund to appellant the discriminatory portion of the excise taxes . . . .

Appendix A, pp. A4-A5. To paraphrase, the court's holding was:

> Even if the Petitioner had standing to seek a refund under the Refund Statute, the inapplicability of the Refund Statute to claims for unconstitutionally collected taxes would not, by virtue of due process, require Georgia to provide a retrospective remedy after the tax has been paid.

The court based this holding on the supposed availability of certain so-called predeprivation remedies for satisfaction of the State's constitutional duty to accord the Petitioner due process. Once again, the Court declined to refer back to the new predeprivation "remedy" posited by it in *Reich I* (protest and demand for refund at the time of tax payment), but referred to certain other so-called predeprivation remedies discussed below.

At this juncture, the court engaged in another curious twist. Having already acknowledged that the Petitioner was required under the Stamp Statute to purchase stamps and remit taxes *before* the Petitioner could sell its products, Appendix A, pp. A3-A4, the court made a 180-degree about-face and held that the Petitioner had not

paid the taxes under duress but had the option of withholding the taxes and pursuing (and presumably obtaining) review of the constitutionality of the taxes before they were paid. The court held that, prior to paying the taxes (which in this instance means purchasing stamps to be affixed to bottles before their shipment into the state), the Petitioner could have challenged the tax in an assessment proceeding under O.C.G.A. § 48-2-54 (Appendix PP), sought a declaratory judgment under O.C.G.A. §§ 9-4-1, *et seq.* (Appendices GG, HH and II) coupled with an interlocutory injunction under O.C.G.A. § 9-11-65 (Appendix KK); or sought an administrative hearing under O.C.G.A. §§ 50-13-11 & 50-13-12 (Appendices SS & TT) and 3-2-11 (Appendix U). The court concluded:

> The above survey of certain provisions of Georgia law in place and available to [the Petitioner] prior to its payment of taxes in 1982 – 1985 establishes that [the Petitioner] had available to it several means by which it could attack the validity of former OCGA § 3-4-60 prior to remitting taxes due thereunder. Instead, [the Petitioner] chose to pay the taxes charged without questioning the legal basis therefor. Having failed to avail itself of any one of the variety of predeprivation remedies available to it, [the Petitioner] cannot now complain.

Appendix A, p. A9.

If the decisions of this Court, the Supremacy Clause and the Fourteenth Amendment Due Process Clause are to have any meaning for state taxpayers and for this Petitioner in particular, this Court must grant the Petition herein. Otherwise, in direct and obvious contravention of the decisions of this Court, the State of Georgia will have thwarted the constitutionally guaranteed rights of the Petitioner and a host of other taxpayers.

CURRENT EVENTS IN GEORGIA RELATED TO TAXPAYER RELIEF

The extent to which the State of Georgia will manipulate taxpayer relief depending solely upon political expediency and not upon the requirements of the law or the Constitution is graphically demonstrated by current events in Georgia. These circumstances underscore the need for granting the writ of certiorari here. As is illustrated by the newspaper article and letter set forth in Appendices UU and VV, when Georgia state officials deem it politically expedient, they are willing to refund millions of dollars on a *voluntary* basis with respect to a tax illegally collected, even when the taxpayers paid the tax without any protest, demand for refund or other institution of any other predeprivation process. As was recognized by the State Attorney General, the State's decision to refund the illegal casual sales tax should mandate a refund in the instant case and in *Reich*. Appendix UU. Still, however, the State persists in denying the Petitioner and the *Reich* taxpayer any relief, despite its voluntary refund of millions of dollars to persons who paid the casual sales tax, thereby forcing the Petitioner back to this Court for vindication of the Petitioner's rights.

ARGUMENT AND CITATION OF AUTHORITY

I. THE DECISION OF THE GEORGIA SUPREME COURT DIRECTLY CONTRADICTS THE APPLICABLE DECISIONS OF THIS COURT CONSTRUING THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT TO REQUIRE STATES TO GRANT TAXPAYERS A CLEAR AND CERTAIN REMEDY EITHER PRIOR TO OR AFTER THE PAYMENT OF UNCONSTITUTIONAL TAXES.

A. To Qualify, Due Process Requires the Remedy 1) to Have Been Clear and Certain, 2) if not retroactive, to Have Been a Predeprivation or Prospective Remedy, and 3) if not retroactive, to Have Been a Duress-Free Remedy.

As early as 1912, Justice Holmes, writing for a unanimous Court, held that, in preservation of one's "liberty," one "who denies the legality of a tax *should have a clear and certain remedy.*" *Atchison, Topeka & Santa Fe Ry. v. O'Connor*, 223 U.S. 280, 285-86, 32 S. Ct. 216 (1912) (emphasis supplied). If a remedy, taking all circumstances together, works an "implied duress" to require payment of the tax, that remedy is inconsistent with the requirement of a clear and certain remedy. *Id.*, 32 S. Ct. at 217.

Under the circumstances of that case, the *Atchison* Court identified some three forms of duress: 1) the risk of having to "forfeit [the taxpayer's] right to do business" as one of the costs bound up with exercising a remedy; 2) the risk of having to "pay a penalty" as one of the costs associated with employing a remedy; and 3) "the risk of having [the taxpayer's] contracts disputed and its business injured" as one of the consequences associated with employing a remedy. *Id.* Other obvious forms of duress (subsequently recognized in *McKesson*), would be the risk of criminal prosecution for nonpayment and the risk of

having one's goods seized and/or destroyed for nonpayment as costs associated with employing a remedy. As will be shown below, all five forms of duress are present with each of the remedies cited by the Georgia Supreme Court.

In a more recent (and also unanimous) decision, this Court reaffirmed and amplified the reasoning of *Atchison* and similar decisions. In *McKesson*, this Court reaffirmed the requirement of " 'a clear and certain remedy.' " 110 S. Ct. at 2248 (citation omitted).[8] The Court went on to specify two broad ways in which a state may meet its obligation to provide a clear and certain remedy for deprivation of tax monies.

First, a state may provide a clear and certain remedy by which a taxpayer may have its "objections [to the legality of the tax] *entertained and resolved*" *"before"* the taxpayer must tender tax payments.[9] *Id.* Further, in order to suffice as a clear and certain remedy, such a predeprivation remedy *must be free of and must also be concluded prior to any duress imposed upon the taxpayer to pay the tax.*[10]

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[8] *See also McKesson*, 110 S. Ct. at 2248 (" 'clear and certain remedy' " (citation omitted)), 2251 (" 'clear and certain remedy' " (citation omitted)), 2252 (" 'clear and certain remedy' " (citation omitted)), 2254 (" 'clear and certain remedy' " (citation omitted)).

[9] *See McKesson*, 110 S. Ct. at 2251, 2252 (emphasis in part supplied), 2250 n.17 (" *'before* an individual is finally deprived of a property interest' " (citation omitted, emphasis supplied)), 2250 ("prior to its payment"), 2250 ("by allowing taxpayers *to withhold payment*" (emphasis supplied)), 2250 (" ' " *before* he is deprived of any significant property interest" ' " (citation omitted, emphasis original)).

[10] *See McKesson*, 110 S. Ct. at 2248 (no " 'implied duress under which payment is made' " (citation omitted)), 2251 (no "sanctions and summary remedies designed so that liquor

Further, in discussing the insufficiency (as against the requirement of a clear and certain remedy) of a predeprivation or prospective remedy that imposes duress to pay the tax, the Court reaffirmed and added to the *Atchison* forms of duress.[11] *Second*, a state may meet its obligation to provide a clear and certain remedy by providing a postdeprivation or retrospective remedy so long as that remedy provides "meaningful backward-looking relief to rectify any unconstitutional deprivation," *id.* at 2247 (footnote omitted), for instance, relief in the form of a refund.[12]

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distributors tender tax payments"), 2251 n.21 (no " 'duress' " (citation omitted)), 2251 n.21 (no "economic sanctions for nonpayment"), 2251 n.21 (no "distress sale of land"), 2251 n.21 (no " 'duress' when [the taxpayer] proffers a timely payment merely to avoid a 'serious disadvantage in the assertion of his legal . . . rights' should he withhold payment" (citation omitted, original)), 2251 n.21 (no "duress").

[11] *See McKesson*, 110 S. Ct. at 2248 (no " 'summary remedy, such as distress' " (citation omitted)), 2248 (no "distress sale of [the taxpayer's] lands"), 2248 (no " 'coercive means' " (citation omitted)), 2251 n.20 (no duress in the form of "a warrant which when filed in a local circuit court, directs the county sheriff to levy upon and sell the delinquent taxpayer's goods and chattels to recover the amount of the unpaid tax plus a penalty of 50%, along with interest of 1% per month and the costs of executing the warrant"), 2251 n.20 (no duress in the form of a risk that "the Division may revoke . . . or decline to renew . . . a distributor's license for failure to abide by Florida law, including the statutory requirement that the liquor tax be timely paid"), 2251 n.21 (no duress "in order to avoid financial sanctions or a seizure of real or personal property"), 2251 n.21 (no "economic sanctions for nonpayment"), 2251 n.21 (no "distress sale of land").

[12] *See also McKesson*, 110 S. Ct. at 2248 ("a 'refunding of the tax' " (citation omitted)), 2248 ("a refund"), 2248 (a "remitting of] the tax"), 2249 (" 'a recovery of taxes' " (citation omitted)), 2249 ("to recover the amount of the tax unlawfully exacted"),

Now, most recently in *Harper*, the Court has completely reaffirmed the analysis of *McKesson*, *Atchison*, and other similar decisions:

> "The Due Process Clause of the Fourteenth Amendment obligates the State to provide meaningful backward-looking relief to rectify any unconstitutional deprivation." A State incurs this obligation when it "places a taxpayer under duress promptly to pay a tax when due and relegates him to a postpayment refund action in which he can challenge the tax's legality." A State that "establish[es] various sanctions and summary remedies designed" to prompt taxpayers to "tender . . . payments *before their obligations are* entertained or *resolved*" does not provide taxpayers "a meaningful opportunity to withhold payment and to obtain a *predeprivation determination* of the tax assessment's validity." Such limitations impose constitutionally significant " 'duress' " because a tax payment rendered under these circumstances must be treated as an effort "to avoid financial sanctions or a seizure of real or personal property." *The*

2249 ("granting a refund"), 2249 ("a refund of the excess tax paid"), 2249 ("a refund of excess taxes paid"), 2250 ("a claim for refund"), 2251 ("no choice but to 'undo' the unlawful deprivation by refunding the tax previously paid").

Matthews v. Eldridge, 424 U.S. 319, 96 S. Ct. 893 (1976), cited by the court below, though not a tax case, demonstrates these two choices. While the recipient of disability benefits was initially subject to denial of benefits without a final determination of eligibility, the availability of full retroactive payments comported with due process. "Should it be determined at any point after termination of benefits, that the claimant's disability extended beyond the date of cessation initially established, the worker is entitled to retroactive payments." 96 S. Ct. at 905.

> *State accordingly may not confine a taxpayer under duress to prospective relief.*

Harper, 113 S. Ct. 2510, 2519-20 & n.10 (citation omitted, alteration original, emphasis in part supplied).

B. No Retrospective or Postdeprivation Remedy

As discussed above, in exacting taxes, a state, in order to satisfy its due process obligations, has available two broad remedial choices: it must provide at least one clear and certain predeprivation remedy or one clear and certain postdeprivation remedy. Simply put, Georgia provides neither.

In *Reich I*, the Georgia Supreme Court retracted the only postdeprivation remedy available to any taxpayer who has paid a tax pursuant to a statute subsequently declared unconstitutional – the Refund Statute. On remand from this Court, the *Reich* taxpayer's claim for refund under the Refund Statute was again denied. Thus, the Georgia Supreme Court (without saying so) reaffirmed its decision that the Refund Statute is not available to redress claims of unconstitutional taxation. Though the Georgia Supreme Court was unwilling to restate its *Reich I* holding in express terms, *Reich II* must stand for the proposition that Georgia provides no postdeprivation relief for taxes paid pursuant to an unconstitutional statute. Thus, the Georgia court's discussion in *Beam* (Ga. II) of its "standing" defense to the Refund Statute notwithstanding, Georgia provides no retrospective remedy for the payment of an unconstitutional tax.

Perhaps the *Reich II* court chose not to affirm its prior holding expressly because the court wanted to create the appearance of the availability of a postdeprivation remedy for the Petitioner in the instant case. By taking pains to posit that the Refund Statute "*may be an appropriate means* by which one *may seek* a refund of taxes paid

pursuant to a statute subsequently declared unconstitutional," *Beam (Ga. II)* Appendix A, p. A2, n.3 (emphasis supplied), the Georgia court could then assert its "standing" defense to the Petitioner's refund application under the Refund Statute. Perhaps the Georgia court hoped that this Court would then believe that Georgia provides a postdeprivation refund remedy for the collection of unconstitutional taxes, but that the Petitioner simply does not have standing under Georgia law to pursue the postdeprivation remedy. The Respondents herein could then argue that the constitutional due process threshold is nevertheless met because the refund remedy ostensibly exists.

Denial of a remedy to the Petitioner based upon the supposed standing defense violates the Due Process Clause, even assuming (contrary to fact) that the Georgia courts would otherwise grant the Petitioner relief under the Refund Statute. This is so because, as discussed above, the unconstitutional Commerce Clause injury, in the form of discrimination, is inflicted upon the Petitioner even though, indeed because, the Petitioner passed on the "cost" of the tax by invoicing it to the Petitioner's wholesalers. This very pass-on results in the comparative disadvantage suffered by Petitioner's product when the Petitioner's product is marketed. *McKesson*, 110 S. Ct. at 2255-57. "To whatever extent petitioner succeeded in passing on the economic incidence of the tax through higher prices to its customers, it most likely lost sales to the favored distributors or else incurred other costs (*e.g.*, for advertising) in an effort to maintain its market share." *Id.* at 2256. This result, which goes right to the heart of the Commerce Clause violation, actually confers standing on the Petitioner under this Court's due process jurisprudence.

In other words, while the Georgia court may have the power to construe Georgia law so as to deny the Petitioner a remedy because of the supposed standing defense, the application of such a defense necessarily deprives the Petitioner of any clear and certain post-deprivation remedy to correct the injury inflicted by the tax. Thus, even the Georgia court's standing defense – to a nonexistent remedy – confers standing upon the Petitioner to seek redress for its constitutional injury under the Due Process Clause.

In any event, the Georgia Supreme Court's decisions in *Reich I* and *Reich II*, as to which no standing defense was even arguably applicable, make the possible existence of a standing defense to the Refund Statute totally irrelevant except to underscore the Petitioner's loss of due process rights. Georgia simply does not provide any taxpayer a postdeprivation remedy for taxes collected pursuant to an unconstitutional statute.

C. No Constitutionally Adequate PreDeprivation Remedy

Likewise, Georgia has not provided any predeprivation procedure that complies with the State's due process duty.

1. Not Duress-Free

Without risking 1) criminal prosecution, 2) the seizure and/or destruction of its property as unstamped contraband, and 3) the suspension and/or cancellation of its license, the Petitioner could not have done business in Georgia or shipped its products into Georgia without *first* having affixed stamps to its products *before* they entered Georgia. *See, e.g.*, Georgia Revenue Rule § 560-2-3-.09 (*"No person shall move or cause to be moved into Georgia or receive, hold, purchase, give away, sell, or offer to sell in*

Georgia any distilled spirits . . . unless each individual container of such distilled spirits shall have affixed thereto at all times a tax stamp showing full payment of all the taxes thereon. Tax stamps shall be purchased and affixed to containers by producers prior to shipment" (emphasis supplied)) (Appendix Q); O.C.G.A. §§ 3-1-4 (violation a misdemeanor) (Appendix S); 3-2-3 (Rev. Dept. may deny, suspend or cancel license to do business) (Appendix T); 3-2-33 (unstamped liquor is contraband, which must be destroyed immediately) (Appendix W); 3-2-34 (same) (Appendix X); 3-2-36 ("shall secure warrants or other criminal process . . . shall prosecute") (Appendix Y); 3-3-1 (privilege to deal in alcoholic beverages in Georgia) (Appendix Z); 3-3-3 (license requirement) (Appendix AA); 3-3-9 (violation of these provisions is a misdemeanor) (Appendix BB); 3-3-27 (felony and misdemeanor) (Appendix CC); 3-3-29 ("no person knowingly and intentionally shall possess, sell, or purchase any distilled spirits not bearing proper tax stamps") (Appendix DD).

Further, **4)** under the very same authorities cited in the preceding paragraph, other licensees (wholesalers, retailers) in the Georgia system of alcohol beverage distribution and even consumers would have been subject to the risk of criminal prosecution or license suspension/cancellation for dealing in unstamped product. And that unstamped product, as contraband, would have been subject to seizure and/or destruction in the hands of such licensees and consumers as well. These adverse consequences for other licensees and for consumers would have dissuaded such persons from doing business with the Petitioner. Moreover, any adverse impact upon the Petitioner's license in the State of Georgia would have had a ripple effect upon the Petitioner's licenses and ability to do business in interstate commerce in other

states and jurisdictions. In other words, there was also the further duress upon the Petitioner to pay the tax in the form of a severe adverse effect upon the Petitioner's practical ability to do business – what the *Atchison* Court called a "risk [to the taxpayer] of having its contracts disputed and its business injured." 32 S. Ct. at 217.

Finally, **5)** the Petitioner would have been subject to the risk of severe civil penalties by not paying the tax.[13] Even if the Petitioner had chosen to violate Georgia's tax stamp laws, awaited receipt of an assessment notice, and filed an appeal from the notice pursuant to O.C.G.A. § 48-2-59 (Appendix RR) (cited by the court below as a clear and certain predeprivation remedy), yet further obligations would have been imposed. *See* O.C.G.A. § 48-2-59(c) (security bond for tax *plus* interest *plus* costs). Further, whenever the Revenue Department issues an assessment (regardless of any appeal), the law imposes yet other penalties and interest charges. *See* O.C.G.A. §§ 3-2-11 (Appendix U), 48-2-44 (Appendix OO), 48-2-40 (Appendix NN).

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[13] If a taxpayer fails to pay a tax, the Revenue Department issues an Official Notice of Assessment and Demand for Payment, whereby a "Demand is hereby made for immediate payment of the amount shown above" and a further warning is made as follows:

> A state tax execution is being issued in the amount of this assessment. Unless immediate payment in full is received at the office indicated herein, the fi. fa. will be recorded and levied upon any property you own. If necessary, other procedures authorized by law, including attachment and garnishment, will be resorted to in order to enforce payment. You may judicially contest, upon certain conditions, any such levy upon your property, and if you pay the assessment as required or if it is collected you may seek a refund, again upon certain conditions.

The Georgia court offered this "clear and certain" comfort to the Petitioner:

> That the Commissioner is statutorily authorized to seek penalties is not a financial sanction tantamount to an attempt to secure payment of taxes under duress . . . since the penalties are subject to waiver by the revenue commissioner upon a determination that the taxpayer's default was the result of reasonable cause and was not due to gross or willful neglect or disregard of the law or regulations.

Appendix A, pp. A6-A7. To suggest that, because of this *discretionary* waiver provision set forth in O.C.G.A. § 3-2-12 (Appendix V), the Petitioner should have shipped unstamped, bootleg spirits into Georgia and awaited an assessment notice without legitimate concern of any adverse consequences merely because the Petitioner held the belief (at first rejected by the Georgia courts) that the Tax Statute violated the Commerce Clause stretches the bounds of credibility.[14] The *McKesson* Court described the types of sanctions and summary remedies it had in mind; *see* 110 S. Ct. at 2251 n.20: "warrant . . . to levy upon and sell," "penalty," "interest," and "revo[cation of] license." The forms of duress brought to bear upon the Petitioner to make sure that the Petitioner paid its taxes prior to shipping its product into Georgia are precisely the types of duress deemed impermissible in *Atchison* and *specifically recognized* in *McKesson* ("sanctions and summary remedies designed so that liquor distributors tender tax payments *before* their objections are entertained and resolved," *id.* at 2251 (emphasis original)), as mandating clear and certain retrospective relief.

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[14] Note that the penalties described in O.C.G.A. §§ 3-2-11, 48-2-40 and 48-2-44 are expressed in mandatory, not discretionary, terms.

None of the statutory procedures relied upon by the court below to satisfy the State's due process obligations did anything to eliminate the continuing duress designed to coerce the Petitioner into continuing to purchase tax stamps to pay the tax imposed in 1982 through 1984 under the Tax Statute. *See* O.C.G.A. §§ 48-2-54 (assessment notice) (Appendix PP); 50-13-12 (administrative hearing procedure) (Appendix TT); 3-2-11 (administrative review) (Appendix U). Further, the possibility of a suit in equity for declaratory/injunctive relief, *see* O.C.G.A. §§ 9-4-1, *et seq.* (declaratory judgment) (Appendices GG, HH and II) and 9-11-65 (injunction) (Appendix KK), does nothing to eliminate the duress upon the taxpayer throughout the pendency of the suit (and appeals thereafter) to continue paying the tax. Moreover, at best, a trial court could exercise its *discretion* to grant interim injunctive relief, and under Georgia law, the power to grant any injunction "shall be prudently and cautiously exercised and, except in clear and urgent cases should not be resorted to." O.C.G.A. § 9-5-8 (Appendix JJ); *Beck v. Glaze*, 230 Ga. 593, 198 S.E.2d 283, 284 (1973); *Davies v. Curry*, 230 Ga. 190, 196 S.E.2d 382, 384 (1973); *Apostolic Overcoming Holy Church of God v. Davis*, 228 Ga. 36, 183 S.E.2d 745, 747 (1971); *Carpenters Local Union No. 3024 v. United Broth. of Carpenters and Joiners of America*, 220 Ga. 596, 140 S.E.2d 876, 878 (1965). The possibility that the trial court (which in this case held even after this Court's *Bacchus* decision in 1985 that the taxes at issue were constitutional during the years they were collected), might in its discretion deem the Petitioner's case clear and urgent in order to exercise its discretion to enjoin Georgia's entire regulatory structure for collection of distilled spirits and alcohol taxes did not make it possible or feasible for the Petitioner to assert a challenge to the tax and continue shipping its product into the state for sale without first

paying the tax. Again, precisely this point was recognized by Justice Holmes when he wrote that, even if the taxpayer "should seek an injunction . . . , he would run the same risk as if he waited to be sued." *Atchison*, 32 S. Ct. at 217.

2. Not Clear and Certain

a. From 1982 through 1984, When the Taxes at Issue Were Paid, Georgia Law Clearly and Certainly Pointed the Petitioner *Only* in the Direction of the Refund Statute.

The clarity and certainty in Georgia law pointed the Petitioner for adjudication of its constitutional challenge, not in the direction of any of the procedures now claimed, but instead decisively in the direction of the Refund Statute. Through the Refund Statute, Respondents affirmatively told the Petitioner that "A taxpayer *shall* be refunded *any and all taxes or fees* which are determined to have been *erroneously or illegally* assessed and collected from him under the laws of this state." O.C.G.A. § 48-2-35(a) (emphasis supplied) (Appendix MM). Moreover, the Refund Statute also affirmatively held out that this mandatory remedy was available to the Petitioner even if the Petitioner went ahead and "paid" the taxes "voluntarily." *Id.*

Thus, the Petitioner was affirmatively told that the Petitioner *need not* evidence its objection to the legality of the tax by, for instance, attempting to initiate some unspecified sort of anticipatory proceeding. None of the remedies relied upon by the court below to satisfy Georgia's due process mandate is specific to the challenge of the legality of a tax, while the Refund Statute on its face specifically addresses the legality of a tax. In other words, Georgia law gave no direction to the Petitioner that it

should have chosen some remedy other than the Refund Statute. The case law, *see, e.g., Collins v. Waldron*, 259 Ga. 582, 385 S.E.2d 74, 75 & n.1 (1989) (holding, in conflict with *Reich I* and *II*, that because Refund Statute provided remedy for unconstitutional tax statute, equitable relief was precluded); *State of Georgia v. Private Truck Counsel of Am., Inc.*, 258 Ga. 531, 371 S.E.2d 378, 380 (1988) (consistent with *Waldron*); *Ingalls Iron Works Co. v. Blackmon*, 133 Ga. App. 164, 210 S.E.2d 377, 378 (1977); *Barber v. Collins*, 201 Ga. App. 104, 410 S.E.2d 444, 445 (1991); *Marconi Avionics, Inc. v. DeKalb County*, 165 Ga. App. 628, 302 S.E.2d 384, 385-86 (1983); *Hawes v. Smith*, 120 Ga. App. 158, 169 S.E.2d 823, 824 (1969), and even the law of this case completely confirmed the Petitioner's choice of the Refund Statute as *the* clear and certain remedy for the Petitioner's challenge to the tax statute. *See* 1988 Fulton Superior Court Order (Appendix F); *Beam* (Ga. I) (Appendix E); Transcript in the United States Supreme Court in *James B. Beam Distilling Co. v. Georgia*, No. 89-680 (U.S.), at 24-34.

The pointless circularity (lack of clarity and certainty) of the State's remedial scheme is placed in sharp relief by the now supposed requirement that one must first protest and demand a refund at the time the tax is paid. For a taxpayer in the Petitioner's position, the only party who could make such protest and demand for refund is the person or entity who pays the tax. The wholesaler is not involved in that transaction. If the Petitioner is then denied standing, then no one could pursue the remedy newly enunciated by the Georgia court in *Reich I*.

By taking back the affirmative representation made by Georgia law in the Refund Statute and by insisting upon patently inapplicable procedures, Respondents and the courts below have themselves created the unclarity

and uncertainty of the remedies procedure available in Georgia. The very act by the Georgia Supreme Court of construing the Refund Statute to deny relief in contradiction to its prior holdings deprived the Petitioner of due process and authorizes this Court's reversal of that decision, even on this point of state law. *See Brinkerhoff-Faris Trust and Savings Co. v. Hill*, 281 U.S. 673, 50 S. Ct. 451 (1930). The State simply may not deny relief by "putting forward nonfederal grounds of decision that were without any fair or substantial support" in preexisting state law. *Ward v. Board of County Comm'rs*, 253 U.S. 17, 40 S. Ct. 419, 421 (1920).[15] *See also Testa v. Katt*, 330 U.S. 386, 67 S. Ct. 810, 814 (1947) ("A state court cannot 'refuse to enforce the right arising from the law of the United States because of conceptions of impolicy or want of wisdom' " in the Federal law.) (citation omitted). The instant case and *Reich I* and *II* are squarely within the holdings of *Brinkerhoff*, *Ward* and *Testa*.

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[15] The Refund Statute provides that a "*taxpayer* shall be refunded. . . . " O.C.G.A. § 48-2-35(a) (emphasis supplied) (Appendix MM). The term " 'Taxpayer' means any person *made liable by law* to file a return or *to pay taxes*." O.C.G.A. §§ 48-1-25 (Appendix LL); 3-1-2(21) (Appendix R). Under Georgia law, "[o]nly the party who actually paid the taxes," *Blackmon v. Premium Oil Stations, Inc.*, 129 Ga. App. 169, 198 S.E.2d 900, 902 (1973), is accorded standing to assert a refund.

In relying upon cases involving sales taxes in Georgia for the denial of standing to the Petitioner, *see, e.g., Eimco BSP Services Co. v. Chilivis*, 241 Ga. 263, 244 S.E.2d 829 (1978); *Atlanta Americana Motor Hotel Corp. v. Undercofler*, 222 Ga. 295, 149 S.E.2d 691 (1966); *Blackmon v. Georgia Independent Oilmen's Ass'n.*, 129 Ga. App. 171, 198 S.E.2d 896 (1973); and *Premium Oil Stations, Inc.*, 198 S.E.2d 900, the court blatantly ignored the holdings of this Court that it is the *discrimination* between local and out-of-state products that occasions the Commerce Clause violation.

b. Additionally not Clear and Certain Because a Ruling on the Constitutionality of the Tax Was Unavailable Under the Administrative Remedies.

The administrative remedies cited by the Georgia Supreme Court would not have enabled the Petitioner to challenge the constitutionality of the tax. As is readily apparent from a cursory reading of Georgia's statutes and regulations, the court ignored the very nature of the tax stamp scheme foisted upon the Petitioner as a precondition to selling its products in the State. Neither O.C.G.A. §§ 50-13-11 & 12 (administrative revenue procedure) (Appendices SS and TT) nor O.C.G.A. §§ 48-2-54, *et seq.* (tax assessment procedure) (Appendix PP, QQ) fits within the tax stamp scheme to allow the Petitioner to continue business, selling unstamped product, while challenging and obtaining a determination of the validity of the tax.

The procedure described in O.C.G.A. § 50-13-12, by its very terms, did not apply to a claim challenging the constitutionality of a Georgia statute. This procedure contemplates a challenge to either **a)** an "act *of the* ***Department*** in a matter involving . . . liabilities for taxes," **b)** a "failure *of the* ***Department*** to act in such a matter," or **c)** an "order *of the* ***Department*** in such a matter." O.C.G.A. § 50-13-12(a) (emphasis supplied). The same is true of the administrative assessment and appeal provisions related specifically to the collection of taxes in O.C.G.A. §§ 48-2-54, *et seq.* Nowhere is the Revenue Commissioner given the authority to declare unconstitutional an act of the legislature. The general principle of law that a mere agency cannot review the acts and statutes passed by the General Assembly confirms the only clear and certain meaning and scope of these administrative procedures. *See, e.g., George v. Department of Natural Resources*, 250 Ga. 491, 299 S.E.2d 556, 557 (1983) (no agency jurisdiction

under the Georgia APA to entertain challenge to constitutionality of statute); *Flint River Mills v. Henry*, 234 Ga. 385, 216 S.E.2d 895, 896 (1975); *Ledford v. Department of Transp.*, 253 Ga. 717, 324 S.E.2d 470, 471 (1985) (same).

c. A Suit for Declaratory/Injunctive Relief was not a Clear and Certain Remedy Available to the Petitioner.

Notwithstanding the affirmative representation of a mandatory refund procedure for any and all taxes deprived, the court below held that the Petitioner's clear and certain remedy lay not in the Refund Statute which on its face addressed whether taxes were "illegally" collected, O.C.G.A. § 48-2-35 (Appendix MM), but in a general suit for declaratory relief under O.C.G.A. §§ 9-4-1, *et seq.* (Appendices GG, HH and II), with a motion for emergency injunctive relief under O.C.G.A. § 9-11-65 (Appendix KK). The only hope for actual prospective relief under this scenario would be to obtain interim injunctive relief while the declaratory proceeding goes forward. Under Georgia law, however, the grant or denial of interlocutory equitable relief lies within the discretion of the trial court. O.C.G.A. § 9-5-8 (Appendix JJ); *Beck*, 198 S.E.2d at 284; *Davies*, 196 S.E.2d at 384; *Apostolic Overcoming Holy Church*, 183 S.E.2d at 747; *Carpenters Local*, 140 S.E.2d at 876. This discretion excludes declaratory/injunctive relief from the "clear and certain" category.

As is obvious from *McKesson* and *Harper*, this Court was not talking about some general procedure or suit in equity when it confirmed the requirement of a clear and certain remedy. The Court obviously had in mind a remedy specifically related to the collection of taxes that a taxpayer could readily identify as a safe harbor from any duress that might otherwise exist to exact payment of

taxes while the taxpayer pursues its claim that the tax at issue is unconstitutional.[16]

Further, the Georgia court's decision here ignores the historical fact that equitable relief to enjoin the tax stamp obligation *was in fact sought and squarely denied*. In litigation parallel to the instant case, an alcohol beverage supplier, situated identically to the Petitioner, did bring a suit to enjoin the 1985 version of the Tax Statute. In that suit, Respondents successfully argued regulatory and administrative chaos not in the public interest, and that taxpayers must first pay the tax and then utilize the statutory cause of action provided in the Refund Statute. And the trial court in that litigation refused to enjoin the imposition of the tax through the collection of stamps and directed the taxpayer there to the statutory procedure in the Refund Statute as the proper vehicle available to taxpayers for adjudication of their constitutionality claims. (Appendix P).

Put in stark and simple terms, if an alcohol beverage taxpayer sued in equity to enjoin the tax, the taxpayer was unceremoniously poured out of court and told bluntly by both Respondents and the courts to pay the tax and to bring its constitutional claims in a proceeding under the Refund Statute. *See, e.g., Collins v. Waldron*, 259 Ga. 582, 385 S.E.2d 74, 75 (1989). If, on the other hand, the

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[16] The State of Florida had declaratory and equitable statutes similar to Georgia's when the Court held in *McKesson* that Florida had provided no constitutionally adequate predeprivation remedy. *See, e.g.*, Fla. Rule Civ. Pro. 1.610 (injunction); Fla. Stat. § 86.011 *et seq.* (declaratory judgment). This Court in *McKesson* rejected the reliance of the State of Florida in its briefing upon the availability of these other more general remedies.

taxpayer follows that clear and certain official and judicial directive, as the Petitioner herein has done, the taxpayer is told, *long after the fact and long after it is too late to do anything about it*, that the taxpayer should, alas, have brought a suit in equity to enjoin the tax and that the taxpayer has no remedy now.[17]

CONCLUSION

Regrettably, the Respondents and the courts below have not taken the due process decisions of this Court or the Federal constitutional and other rights of state taxpayers seriously. No taxpayer could have guessed in 1982

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[17] Further, a defendant may handily defeat a suit in equity by merely asserting the defense of the availability of a statutory procedure. *See, e.g., Rybert & Co. v. City of Atlanta*, 258 Ga. 347, 368 S.E.2d 739, 742 (1988); *Georgia Pub. Serv. Comm'n v. Southern Bell*, 254 Ga. 244, 327 S.E.2d 726, 728 (1985); *Schieffelin & Co. v. Strickland*, 253 Ga. 385, 320 S.E.2d 358, 360-61 (1984); *Newsome v. Brown*, 252 Ga. 421, 314 S.E.2d 225, 226 (1984); *Benton v. Gwinnett County Bd. of Educ.*, Ga. App. 533, 309 S.E.2d 680, 682 (1983); *George*, 250 Ga. 491, 299 S.E.2d at 557-58 ("courts should not render declaratory judgments where other *statutory remedies* have been specifically provided." (emphasis supplied)); *Brogdon v. State Bd. of Veterinary Medicine*, 244 Ga. 780, 262 S.E.2d 56, 57-58 (1979); *Guice v. Pope*, 229 Ga. 136, 189 S.E.2d 424, 426 (1972); *Henderson v. Carter*, 229 Ga. 876, 195 S.E.2d 4, 7 (1972); *Shippen v. Folsom*, 200 Ga. 58, 35 S.E.2d 915, 916-17 (1945); *Wright v. Forrester*, 192 Ga. 864, 16 S.E.2d 873, 875 (1941); *see also Cantrell v. Henry County*, 250 Ga. 822, 301 S.E.2d 870, 872 (1983). Thus, even though the Georgia declaratory judgment statute states that the availability of another remedy will not preclude declaratory relief, *see* O.C.G.A. § 9-4-2(c) (Appendix HH), the Georgia Supreme Court has authoritatively ruled that, this language notwithstanding, "courts should not render declaratory judgments where other *statutory remedies* have been specifically provided." *George*, 250 Ga. 491, 299 S.E.2d at 558 (emphasis supplied); *see also Rybert*, 258 Ga. 347, 368 S.E.2d at 742.

that the Georgia Supreme Court would a decade later renounce the clear language of the Refund Statute; create a new, mandatory predeprivation protest and demand remedy; authorize preliminary equitable relief to enjoin Georgia's alcohol tax collection (tax stamp) scheme; or authorize administrative hearing officers to determine the constitutionality of state tax statutes. The Petitioner respectfully requests that this Court grant a writ of certiorari and send to the states the clear message that they may not ignore the Supreme Law of the Land as construed by this Court, regardless of how desirous the states may be of retaining money collected by them in contravention of the United States Constitution.

Respectfully submitted,

Counsel of Record:

MORTON SIEGEL
SIEGEL, MOSES, SCHOENSTADT & WEBSTER
10 East Huron
Chicago, Illinois 60611
Telephone: 312-664-8998

JOHN L. TAYLOR, JR.
VINCENT, CHOREY, TAYLOR & FEIL
A Professional Corporation
The Lenox Building, Suite 1700
3399 Peachtree Road, N.E.
Atlanta, Georgia 30326
Telephone: 404/841-3200

No. _____

In The

Supreme Court of the United States

October Term, 1993

JAMES B. BEAM DISTILLING CO.,

Petitioner,

v.

STATE OF GEORGIA; JOE FRANK HARRIS, individually; ZELL MILLER, individually and as Governor of the State of Georgia; MARCUS E. COLLINS, individually and as Georgia State Revenue Commissioner; and CLAUDE L. VICKERS, individually and as Director of the Fiscal Division of the Department of Administrative Services,

Respondents.

On Petition for Writ of Certiorari To The Supreme Court of Georgia

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

APPENDICES

A December 2, 1993 Georgia Supreme Court Order In *James B. Beam Distilling Co. v. State* A1

B February 11, 1993 Fulton County Superior Court Order in *James B. Beam Distilling Co. v. State* B1

C April 6, 1993 Fulton County Superior Court Order in *James B. Beam Distilling Co. v. State* C1

D *James B. Beam Distilling Co. v. State*, 501 U.S. ___, 111 S.Ct. 2439 (1991)....D1

E *James B. Beam Distilling Co. v. State*, 259 Ga. 363, 382 S.E.2d 95 (1989) E1

F May 27, 1988 Fulton County Superior Court Order in *James B. Beam Distilling Co. v. State* F1

G U.S. Const. Art. VI (Supremacy Clause)....G1

H U.S. Const. Art. 1, Sec. 8, Cl. 3 (Commerce Clause)....H1

I U.S. Const. 14th Amend. (Due Process Clause)....I1

J U.S. Const. 14th Amend. (Equal Protection Clause)....J1

K December 2, 1993 Georgia Supreme Court decision in *Reich v. Collins*, ___ Ga. ___, ___ S.E.2d ___, 1993 WL 503247 (1993)....K1

L *Reich v. Collins*, 262 Ga. 625, 422 S.E.2d 846 (1992) L1

M Complaint....M1

N Amended Complaint N1

O Second Amended Complaint....O1

APPENDICES – Continued

P	May 12, 1985 Order of Fulton County Superior Court in *Heublein v. State*	P1
Q	Georgia Revenue Rule § 560-2-3-.09	Q1
R	O.C.G.A. § 3-1-2(21)	R1
S	O.C.G.A. § 3-1-4	S1
T	O.C.G.A. § 3-2-3	T1
U	O.C.G.A. § 3-2-11	U1
V	O.C.G.A. § 3-2-12	V1
W	O.C.G.A. § 3-2-33	W1
X	O.C.G.A. § 3-2-34	X1
Y	O.C.G.A. § 3-2-36	Y1
Z	O.C.G.A. § 3-3-1	Z1
AA	O.C.G.A. § 3-3-3	AA1
BB	O.C.G.A. § 3-3-9	BB1
CC	O.C.G.A. § 3-3-27	CC1
DD	O.C.G.A. § 3-3-29	DD1
EE	O.C.G.A. § 3-4-60	EE1
FF	O.C.G.A. § 3-4-61	FF1
GG	O.C.G.A. § 9-4-1	GG1
HH	O.C.G.A. § 9-4-2	HH1
II	O.C.G.A. § 9-4-3	II1
JJ	O.C.G.A. § 9-5-8	JJ1

APPENDICES – Continued

KK O.C.G.A. § 9-11-65 ..... KK1

LL O.C.G.A. § 48-1-2(25) LL1

MM O.C.G.A. § 48-2-35 ..... MM1

NN O.C.G.A. § 48-2-40 ..... NN1

OO O.C.G.A. § 48-2-44 ..... OO1

PP O.C.G.A. § 48-2-54 ..... PP1

QQ O.C.G.A. § 48-2-55 ..... QQ1

RR O.C.G.A. § 48-2-59 ..... RR1

SS O.C.G.A. § 50-13-11 ..... SS1

TT O.C.G.A. § 50-13-12 ..... TT1

UU December 9, 1993 Letter from Bowers to Collins UU1

VV December 15, 1993 Atlanta *Constitution* Article VV1

APPENDIX A

In the Supreme Court of Georgia

Decided: Dec. 2, 1993

S93A1217, S93A1218. JAMES B. BEAM DISTILLING CO. v. STATE OF GEORGIA et al. (two cases)

BENHAM, Justice.

Appellant James B. Beam Distilling Company (Beam) brought this action seeking a refund for taxes paid pursuant to O.C.G.A. § 3-4-60[1] in 1982-1984. See O.C.G.A. § 48-2-35. The trial court's decision that O.C.G.A. § 3-4-60 violated the Commerce Clause of the United States Constitution was affirmed by this court, as was the trial court's determination that the ruling was to be applied prospectively only. *James B. Beam &c. v. State of Georgia*, 259 Ga. 363 (382 SE2d 95) (1989) (*"Beam I"*). After granting Beam's application for certiorari, the Supreme Court of the United States ruled that its decision in *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (104 SC 3049, 82 LE2d 200) (1984), was applicable retroactively to Beam's claims that arose on facts antedating the Bacchus decision, and remanded the case for determination of remedial issues. *James B. Beam Distilling Co. v. Georgia*, 501 U.S. ___ (111 SC 2439, 115 LE2d 481) (1991). We, in turn, remanded the case to the trial court which granted summary judgment

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[1] The statute was amended in 1985 after the United States Supreme Court found a similar statute from Hawaii to be an unconstitutional violation of the Commerce Clause (*Bacchus Imports v. Dias*, 468 U.S. 263 (104 SC 3049, 82 LE2d 200) (1984)), and the amended statute has withstood constitutional challenge. See *Heublein, Inc. v. State of Georgia*, 256 Ga. 578 (351 SE2d 190) (1987).

to appellee after concluding, based on three independent grounds, that appellant was not entitled to a refund of the 1982-84 taxes. The appeal in S93A1217 is from the trial court's denial of summary judgment TO [sic] Beam and the grant of summary judgment to the State on Beam's original complaint. The appeal in S93A1218 is from the trial court's denial of summary judgment to Beam on the allegations raised in the first and second amendments to its complaint, and the grant of summary judgment to the State on the amendments.

1. After our remand to the trial court, appellant amended its complaint to seek a judicial determination that OCGA § 48-2-35 (the refund statute) was applicable to appellant and that the 1992 amendment to OCGA § 3-2-14 (a) was unconstitutional as applied to Beam; and to assert a claim under 42 USC § 1983 and a concomitant claim for attorney fees under 42 USC § 1988. The State amended its answer to assert several additional defenses, including the assertion that appellant did not have standing to seek a refund under OCGA § 48-2-35.[2] We entertain the State's standing argument because the consideration of a remedy "may well be . . . obviated by issues of state law." *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 277 (104 SC 3049, 82 LE2d 200) (1984).[3]

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[2] The U.S. Supreme Court invited the State to invoke, on remand, independent procedural bases for its refusal to provide a refund. See *Beam Distilling Co. v. Georgia, supra*, 111 SC 2439, 2448.

[3] For purposes of this appeal, we assume that OCGA § 48-2-35 may be an appropriate means by which one may seek a refund of taxes paid pursuant to a statute subsequently declared unconstitutional. See *State of Georgia v. Private Truck Council &c.*,

2. "A particular remedy is not available to a party who has no entitlement to the right sought to be secured." *Ragsdale v. New England Land &c. Corp.*, 250 Ga. 233 (1) (297 SE2d 31) (1982). In cases involving the Georgia sales and use tax (OCGA § 48-8-30 et seq.), the appellate courts of this State have repeatedly held that the payer of taxes to the State, while technically a "taxpayer" under § 48-2-35, does not have standing to file a claim for refund of taxes illegally collected or erroneously paid if the party remitting the taxes passed the tax on to its customers. *Eimco BSP Services Co. v. Chilivis*, 241 Ga. 263 (244 SE2d 829) (1978); *Atlanta Americana Motor Hotel Corp. v. Undercofler*, 222 Ga. 295 (1) (149 SE2d 691) (1966); *Blackmon v. Ga. Ind. Oilmen's Assn.*, 129 Ga. App. 171 (3) (198 SE2d 896) (1973); *Blackmon v. Premium Oil Stations, Inc.*, 129 Ga. App. 169 (2) (198 SE2d 900) (1973). If the remitting party did not bear the burden of the tax, it is not entitled to bring a suit to recover a refund of any overpayment.

In the case at bar, the applicable version of OCGA § 3-4-60 (1) levied and imposed an excise tax on alcohol and distilled spirits imported into Georgia. By requiring the stamps denoting payment of the tax to be affixed by the manufacturer or the wholesaler to each bottle or container of distilled spirits before shipment to any retailer (OCGA § 3-4-61 (2) (1982)), the General Assembly expressed its intent that the excise tax be paid before the

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258 Ga. 531 (371 SE2d 378) (1988). But see *Reich v. Collins*, 262 Ga. 625 (422 SE2d 826) (1992)

product was made available for purchase by the consuming public.[4] Where a wholesaler is a link in the chain of delivery of the product to the retailer, it is essential that the excise tax be paid by the time the product leaves the wholesaler.[5] Where, as here, the manufacturer remits tax payment to the revenue commissioner and subsequently, in an itemized billing statement, requires the wholesaler to remit payment for "state stamps" or "state tax," it is the wholesaler which is the taxpayer for purposes of OCGA § 48-2-35.[6] Due to its lack of standing, appellant is procedurally barred from pursuing an action for refund under OCGA § 48-2-35.

3. Even assuming that appellant was not procedurally barred from seeking a refund under § 48-2-35, federal due process, as interpreted by the Supreme Court in *McKesson Corp. v. Fla. Alcoholic Beverages and Tobacco Div.*, 496 U.S. 18 (110 SC 2323, 110 LE2d 148) (1990), and elaborated upon in *Harper v. Virginia Dept. of Taxation*, 509 U.S. ___ (113 SC 2510, 509 LE2d ___) (1993), does not

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[4] Stamps denoting the payment of the excise tax were required to be affixed to each bottle or container of distilled spirits. OCGA § 3-4-61 (1982). Effective February 1, 1993, the revenue commissioner is required to adopt rules and regulations eliminating the use of a stamp in the payment of the excise tax on distilled spirits and alcohol. See OCGA § 3-4-61 (1992).

[5] In 1992, the legislature amended OCGA § 3-4-61 to state explicitly that the excise tax was to be paid by the wholesale dealer. OCGA § 3-4-61 (a) (1992).

[6] Credits or refunds issued in the discretion of the revenue commissioner under OCGA § 3-2-13 to a manufacturer are statutorily required to be refunded or credited to the wholesaler, the party who actually paid the tax.

require that the State of Georgia refund to appellant the discriminatory portion of the excise taxes appellant remitted in 1982-1984 pursuant to OCGA § 3-2-60.[7]

A governmental requirement that one pay a tax deprives the payor of property, and such a deprivation mandates compliance with the Due Process Clause of the Constitution of the United States. Due process requires a government to have procedural means by which the taxpayer may safeguard against unlawful exactions. *McKesson*, 110 SC 2238, supra, at 2250. "The fundamental requirement of due process is the opportunity to be heard '[sic] at a meaningful time and in a meaningful manner." [sic] [Cits]." *Mathews v. Eldridge*, 424 U.S. 319, 333 (96 SC 893, 47 LE2d 18) (1976). While due process generally requires that the hearing be held prior to the deprivation, the Court, recognizing that the exaction of taxes is the lifeblood of a governmental entity, has permitted governments to exact taxes and require the taxpayer to voice objections to the tax thereafter.

Should the governmental entity so procedurally limit itself, it must provide "meaningful, backward-looking relief to rectify any unconstitutional deprivation."

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[7] Appellant contends that our statement in *Beam I*, 259 Ga. 363, at 365, that the State would have to refund monies should the *Bacchus* decision be applied retroactively is a conclusive admission that refunds are due now that the U.S. Supreme Court has decided the retroactivity issue adversely to the State. *Beam*, 501 U.S. ___. In so relying on the statement, appellant has taken it out of its context, a discussion of the equities of retroactivity under the analysis set forth in *Chevron Oil v. Huson*, 404 U.S. 97 (92 SC 349, 30 LE2d 296) (1971).

McKesson, supra, at 2247. However, should the government provide a procedure through which the taxpayer may challenge the validity of the taking *prior to* the deprivation, the Due Process Clause is satisfied. *Id.*, at 2251, n.21. Thus, before attempting to fashion a post-deprivation, meaningful, backward-looking remedy,[8] we must determine the state law question of whether Georgia law "provides an adequate form of predeprivation process. . . ." *Harper v. Va. Dept. of Taxation*, 113 SC 2510, supra, at 2520.

4. In its discussions on the topic, the U.S. Supreme Court illustrates "predeprivation process" as that which authorizes taxpayers to bring suit to enjoin imposition of a tax prior to its payment, or that which permits taxpayers to withhold contested tax assessments and challenge their validity in a predeprivation hearing. *McKesson*, supra, at 2250 and 2251, n.21. In Georgia, a taxpayer who fails to pay taxes due is subject to being named a defendant in an action brought by the revenue commissioner to collect the amount due. OCGA § 48-2-54. In such an action, the taxpayer would have the opportunity to challenge the validity of the imposition of the contested taxation prior to paying the tax. That the Commissioner is statutorily authorized to seek penalties is not a financial sanction tantamount to an attempt to secure payment of taxes under duress (see *McKesson*, supra, at

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[8] The U.S. Supreme Court has consistently left it to the States to craft an appropriate post-deprivation remedy. See e.g., *Harper v. Va. Dept. of Taxation*, supra; *James B. Beam Distilling Co. v. Ga.*, supra; *McKesson v. Fla. Alcoholic Beverages &c.*, supra; *Davis v. Michigan*, 489 U.S. 803 (109 SC 1500, 103 LE2d 891) (1989); and *Bacchus Imports v. Dias*, supra.

2251, n.21, and *Harper*, supra, at 2519, n. 10) since the penalties are subject to waiver by the revenue commissioner upon a determination that the taxpayer's default was the result of reasonable cause and was not due to gross or willful neglect or disregard of the law or regulations. OCGA § 3-2-12.

5. In addition, Georgia statutes make declaratory judgment relief available prior to payment of disputed taxes "to settle and afford relief from uncertainty and insecurity with respect to rights, status, and other legal relations . . . " (OCGA § 9-4-1), and such relief is available even if the party has other adequate legal or equitable remedies. OCGA § 9-4-2 (c).

> The Declaratory Judgment Act is an alternative or additional remedy to facilitate the administration of justice more readily . . . [and is] intended to give additional protection to a person who may become involved in an actual justiciable controversy. . . . [*Shippen v. Folsom*, 200 Ga. 58, 68 (35 SE2d 915) (1945)].

Another intended purpose of declaratory judgment is "to afford a speedy and inexpensive method of adjudicating legal disputes." *Clein v. Kaplan*, 201 Ga. 396, 404 (40 SE2d 133) (1946). In furtherance of this goal, the Declaratory Judgment Act empowers the superior court in which a petition for declaratory judgment is filed to grant injunctive or other interlocutory extraordinary relief in connection with the petition. OCGA § 9-4-3 (b); see also OCGA § 9-11-65 (b). Thus, a petition may be filed seeking a judgment declaring a statute or ordinance unconstitutional and praying for an injunction against the enforcement of the questioned law. See e.g., *Gravely v. Bacon*, 263

Ga. 203 (429 SE2d 663) (1993); *State of Georgia v. Private Truck Council &c.*, 258 Ga. 531 (371 SE2d 378) (1988); *City of Atlanta v. Spence*, 242 Ga. 194 (249 SE2d 554) (1978); *State of Georgia v. Golia*, 235 Ga. 791 (222 SE2d 27) (1976).[9] Should the party seeking relief be threatened with immediate and irreparable injury, loss, or damage, the party may apply immediately for a temporary restraining order. OCGA § 9-11-65 (b). When tax statutes have been the subject of a declaratory judgment action, the trial court has exercised its discretion to establish escrow funds for payment of the disputed taxes should the taxpayer choose to tender payment. See *Collins v. Waldron*, 259 Ga. 582 (385 SE2d 74) (1989); *State of Georgia v. Private Truck Council*, supra, at Div. 4. In sum, a taxpayer who wishes to challenge the validity of a statute that imposes a duty upon him to pay a tax may do so prior to paying the disputed tax, and has recourse to judicial remedies to enjoin collection of the contested tax pending final determination of his judicial challenge to the statute.

6. Finally, within the Georgia Alcoholic Beverage Code (OCGA §§ 3-1-1 et seq.) there is in place the means by which appellant, as a licensed wholesale dealer (see OCGA § 3-1-2 (23)), could receive administrative review, complete with notice and a hearing, of the commissioner's determination that appellant had not remitted the "proper amount of taxes." OCGA § 3-2-11 (2). Under

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[9] In point of fact, in 1985, several of appellant's attorneys, then representing an importer of alcoholic beverages, filed an action against Georgia's taxing authorities in which they sought a declaratory judgment that a taxing statute was unconstitutional and an injunction against its enforcement. See *Hublein, Inc. v. State of Georgia*, 256 Ga. 578 (351 SE2d 190) (1987).

this scheme, appellant could remit the non-discriminatory portion of its tax assessment and attack the taxing statute in the administrative hearing held to determine the amount due. The notice and hearing provisions of the Georgia Administrative Procedure Act (OCGA § 50-13) are incorporated into the procedure for assessment of taxes due in OCGA § 3-2-11 (2). Furthermore, within the APA there is a section exclusively devoted to the hearing procedure required of the Department of Revenue within 30 days of receipt of a demand therefor by "any taxpayer aggrieved by any act of the department in a matter involving his liability for taxes. . . . " OCGA § 50-13-12. OCGA § 50-13-12 (d) recognizes that judicial remedies may also be available to the aggrieved taxpayer, and requires the taxpayer to elect between pursuing judicial remedies or the remedy available for a "contested case" within the APA.

7. The above survey of certain provisions of Georgia law in place and available to appellant prior to its payment of taxes in 1982 – 1985 establishes that appellant had available to it several means by which it could attack the validity of former OCGA § 3-4-60 prior to remitting taxes due thereunder. Instead, appellant chose to pay the taxes charged without questioning the legal basis therefor. Having failed to avail itself of any one of the variety of predeprivation remedies available to it, appellant cannot now complain. See *United States v. Tax Commission of Mississippi*, 412 U.S. 363, 368, n. 11 (93 SC 2183, 37 LE2d 1) (1973); *McKesson v. Fla. Div. of Alcoholic &c.*, supra, at 2251, n. 21.

We conclude that appellant was procedurally barred from pursuing a refund action for the taxes remitted in

1982 – 1985 pursuant to former OCGA § 3-4-60 and that, even if appellant were entitled to pursue a refund action, its failure to avail itself of the predeprivation remedies available to it prior to payment of the disputed taxes results in denial of recovery of taxes so paid.

8. In light of our decision on the issues raised in A93A1217, we need not address the enumeration of errors asserted in A93A1218.

Judgment affirmed. All the Justices concur, except Sears-Collins and Carley, JJ., who concur in Divisions 1 and 2 and the judgment.

S93A1217, S93A1218. JAMES B. BEAM DISTILLING CO. v. THE STATE OF GEORGIA et al. (two cases)

CARLEY, Justice, concurring.

Divisions 1 and 2 of the majority opinion hold that appellant has no standing to seek a refund of taxes that it previously paid the State pursuant to former OCGA § 3-4-60. I concur fully in those divisions and in the judgment of affirmance based upon the procedural bar of appellant's lack of standing. Since appellant has no standing to seek a refund, I would not reach the merits of appellant's entitlement to recover a refund which the majority addresses in Divisions 3, 4, 5, 6 and 7 of its opinion. I would note, however, that, for the reasons set forth in my dissent in *Reich v. Collins*, ___ Ga. ___ (Case Number S93A0621, decided December ___, 1993), I believe that the majority erroneously holds in those divisions that appellant would be barred from recovering a refund for its failure to have pursued the

predeprivation remedies that are available to a Georgia taxpayer.

I am authorized to state that Justice Sears-Collins joins in this opinion.

APPENDIX B

THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

JAMES B. BEAM DISTILLING CO., Plaintiff v. STATE OF GEORGIA, ZELL MILLER, individually and as Governor of the State of Georgia, MARCUS E. COLLINS, Individually and as Georgia State Revenue Commissioner, and CLAUDE L. VICKERS, individually and as Director of the Fiscal Division of the Department of Administrative Services, Defendants	CIVIL ACTION FILE NO. D-42527 FINAL JUDGMENT ON PLAINTIFF'S COMPLAINT (Filed Feb. 11, 1993)

I. PROCEDURAL HISTORY

This suit for a tax refund of distilled spirits excise taxes for 1982-84 imposed under the pre-1985 version of O.C.G.A. § 3-4-60 is before the trial court on remand from the United States Supreme Court and the Supreme Court of Georgia. *James B. Beam Distilling Co. v. Georgia*, 259 Ga. 363, 382 S.E.2d 95 (1989), *rev'd and remanded*, 501 U.S. ___, 111 S.Ct. 2439, 115 L.Ed. 2d 481 (1991) (hereinafter "*Beam*").[1]

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[1] The original version of O.C.G.A. § 3-4-60 was enacted in 1938. In 1985, O.C.G.A. § 3-4-60 was amended. This case involves only the pre-1985 version held unconstitutional in *Beam*.

On May 27, 1988, Judge Ralph Hicks entered an Order finding that O.C.G.A. § 3-4-60 was unconstitutional under the Commerce Clause because it provided preferential excise tax treatment to alcoholic beverage manufacturers in Georgia. Out-of-state manufacturers were paying twice the excise tax that in-state manufacturers were paying on distilled spirits. However, Judge Hicks' Order applied the ruling prospectively only and Beam appealed the trial court's failure to apply its ruling retroactively. In 1989, the Georgia Supreme Court affirmed the trial court's decision in *James B. Beam Distilling Co. v. Georgia*, 259 Ga. 363, 382 S.E.2d 95 (1989). Plaintiff Beam then petitioned for certiorari to the United States Supreme Court.

In 1991, the United States Supreme Court reversed the Georgia courts' decisions and held that the Georgia courts' rulings that O.C.G.A. § 3-4-60 is unconstitutional must be applied retroactively to the 1982-84 tax years. The United States Supreme Court stressed that its prior decision in *Bacchus Imports Ltd. v. Dias*, 468 U.S. 263, 104 S.Ct. 3049, 82 L.Ed.2d 200 (1984), invalidating a similar Hawaii tax law under the Commerce Clause, should be read to hold that its rule should be applied retroactively to the litigants before the Court in *Bacchus*. Although *Bacchus* applied the rule retroactively, the United States Supreme Court noted that "the Georgia courts refused to apply that rule with respect to the litigants in this case." 501 U.S. at ___, 111 S.Ct. at 2446, 115 L.Ed.2d 481 (991).

In *Beam*, Justice Souter, writing for the United States Supreme Court, expressly and carefully limited the Supreme Court's decision to the narrow issue of when the

Supreme Court applies a rule of law to litigants retroactively in one case (i.e., *Bacchus*), must it do so with respect to all others not barred by procedural requirements or res judicata. In answering that narrow question, the Supreme Court held that plaintiff Beam should have the benefit of *Bacchus* and that the Georgia courts' rulings holding O.C.G.A. § 3-4-60 unconstitutional under *Bacchus* must be applied retroactively to Beam.

However, Justice Souter made it clear that nothing in the Supreme Court's decision affected or determined the remedy or precluded the State of Georgia from raising procedural or other bars to recovery under State law. Instead, Justice Souter expressly noted that these issues had not been considered or argued and remanded the case to the Georgia Supreme Court, stating as follows:

> The grounds for our decision today are narrow. They are confined entirely to an issue of choice of law: when the Court has applied a rule of law to the litigants in one case it must do so with respect to all others not barred by procedural requirements or res judicata. We do not speculate as to the bounds or propriety of pure prospectivity.
>
> Nor do we speculate about the remedy that may be appropriate in this case; remedial issues were neither considered below nor argued to this Court, save for an effort by petitioner to buttress its claim by reference to our decision last Term in *McKesson*. As we have observed repeatedly, federal "issues of remedy . . . may well be intertwined with, or their consideration obviated by, issues of state law." *Bacchus*, 468 U.S., at 277, 104 S.Ct., at 3058. Nothing we say here deprives respondent of his opportunity to

> raise procedural bars to recovery under state law or demonstrate reliance interests entitled to consideration in determining the nature of the remedy that must be provided, a matter with which *McKesson* did not deal. 501 U.S. at ___, 111 S.Ct. at 24-48, 115 L.Ed.2d at 493-94 (1991).

On November 1, 1991, the Georgia Supreme Court, in turn, remanded this case to the "trial court for further proceedings consistent with the decision of the United States Supreme Court" in *Beam*.

On June 23, 1992, plaintiff Beam filed a Motion for Summary Judgment on the remedy issues. On August 3, 1992, the State defendants filed a Cross-Motion for Summary Judgment. Oral argument was held initially on September 16, 1992, and the parties requested additional time for briefs and proposed Orders. Subsequently, on November 19, 1992, the Georgia Supreme Court rendered its decision in *Reich v. Collins, et al.*, Case Nos. S92A00621 and S92A0622, ___ Ga. ___, ___ S.E.2d ___ (Ga. Supreme Ct., Nov. 19, 1992) construing the tax refund statute in issue here. As a result, the parties again requested, and the Court again extended, the time to and through January 26, 1993 for all briefs to be filed. The case is now ripe for final judgment on plaintiff's initial Complaint.

II. FINDING OF FACTS

The following material facts are undisputed.

James B. Beam Distilling Co. ("Beam"), a Delaware corporation, produces alcoholic beverages and imports them into Georgia by shipping them to wholesalers doing business in Georgia. Beam is engaged in business in

interstate commerce throughout the United States and is permitted by federal and Georgia authorities to import alcoholic beverages.

Pursuant to O.C.G.A. §§ 3-4-60 and 3-4-61, Beam paid $2,252,096.75 in State excise taxes during 1982-84 in order to purchase liquor stamps in proper denominations denoting the payment of taxes and in order to affix such stamps to each bottle or container of alcoholic beverages.

The legal incidence for paying the taxes pursuant to O.C.G.A. §§ 3-4-60 and 3-4-61 fell on Beam and not Beam's wholesalers in Georgia. *See* Department of Revenue ("DOR") Reg. §§ 560-2-3-.09, 560-2-3-.21 and 560-2-3-.30. However, after Beam paid $2,252,096.75 in 1982-84 to purchase liquor stamps, Beam, in turn, collected the Georgia liquor taxes from its Georgia wholesalers.

On or about April 25, 1985, Beam made a tax refund claim under O.C.G.A. § 48-2-35(a), requesting a refund of excise taxes collected from Beam during 1982 through 1984 under O.C.G.A. § 3-4-60. Beam seeks to recover $2,252,096.75 in taxes paid, plus $1,838,648.90 in pre-judgment interest through October 5, 1992, plus pre-judgment interest accruing thereafter at a daily rate of $555.31.

During 1982-84, the State relied upon the validity of the excise tax collections on distilled spirits under O.C.G.A. § 3-4-60 and expended them, without reserve or contingency, for public programs. *See also Scott v. State*, 187 Ga. 702, 2 S.E.2d 65 (1939) (upholding the tax statute against a Commerce Clause challenge), *overruled on other grounds, Blackston v. Georgia Dept. of Natural Resources*, 255 Ga. 15, 334 S.E.2d

679 (1985); *State Board of Equal. v. Youngs Market Co.*, 299 U.S. 59, 57 S.Ct. 77, 81 L.Ed. 38 (1936).

After the 1984 Supreme Court decision in *Bacchus* invalidating a Hawaii statute similar to O.C.G.A. § 3-4-60, the Legislature of the State of Georgia in 1985 revised O.C.G.A. § 3-4-60. This case involves only tax refunds for 1982-84 excise taxes collected under the pre-1985 version of O.C.G.A. § 3-4-60. The State stresses that all pending tax refund claims against the State for similar pre-1985 excise tax payments equal $31.7 million with interest up to $60 million.

III. CONCLUSIONS OF LAW

A. Remedial Issues on Remand

When the case was first here in 1988, Judge Hicks held that O.C.G.A. § 3-4-60 was unconstitutional, but applied the ruling prospectively. In reversing as to choice-of-law, the United States Supreme Court expressly reserved "remedial issues" for remand. *Beam*, 501 U.S. at ___, 111 S.Ct. at 2448, 115 L.Ed. at 494 (1991).

After the Supreme Court's remand to this trial court, the State amended its Answer to itemize further procedural bars, defenses and remedial issues. The State's defenses are properly before the trial court for resolution.[2] *See Beam*, 501 U.S. at ___, 111 S.Ct. at 2448, 115 L.Ed.2d at 494 (1991); O.C.G.A. §§ 9-11-15(a)&(b),

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[2] After remand, plaintiff Beam also amended its Complaint twice in 1992. The cross Motions for Summary Judgment address only plaintiff's initial Complaint. No Motions are pending regarding the two Amendments to Complaint; however, the rulings herein may moot the issues in the two Amended Complaints.

9-11-60(a); *McDonough Constr. Co. v. McLendon Elec. Co.*, 242 Ga. 510, 515, 250 S.E.2d 424, 429 (1978); *Hunter v. A-1 Bonding Service, Inc.*, 118 Ga. App. 498, 499 164 S.E.2d 246, 248 (1968); *Monroe Motor Express v. Jackson*, 76 Ga. App. 280, 281, 45 S.E.2d 445, 446-47 (1947).

Thus, the issue on remand is whether Beam is entitled to a tax refund remedy under O.C.G.A. § 48-2-35, or, whether the State's defenses preclude or bar a tax refund remedy under the particular facts of this case.

B. Tax Refund Statute O.C.G.A. § 48-2-35

Plaintiff Beam seeks a tax refund under O.C.G.A. § 48-2-35 which provides:

> "(a) A taxpayer shall be refunded any and all taxes or fees which are determined to have been erroneously or illegally assessed and collected from him under the laws of this state, whether paid voluntarily or involuntarily, and shall be refunded interest on the amount of the taxes or fees at the rate of 9 percent per annum from the date of payment of the tax or fee to the commissioner. Refunds shall be drawn from the treasury on warrants of the Governor issued upon itemized requisitions showing in each instance the person to whom the refund is to be made, the amount of the refund, and the reason for the refund."

This tax refund statute is in title 48 in the general Revenue and Taxation Code. This tax refund statute is patterned after the federal refund statute, derives from the common law action of assumpsit, and incorporates both

legal and equitable prerequisites to a recovery. *See e.g., Hawes v. Bigbie,* 123 Ga. App. 122, 123, 179 S.E.2d 660, 661-62 (1970); *Hawes v. Smith,* 120 Ga. App. 158, 169 S.E.2d 823 (1969); *Oxford v. Shuman,* 106 Ga. App. 73, 79, 126 S.E.2d 522, 526 (1962). *See also Jasper School District v. Gormley,* 184 Ga. 756, 757-61, 193 S.E.2d 248, 250 (1937).

After reviewing the record herein, this court finds that plaintiff Beam is not entitled to a tax refund under O.C.G.A. § 48-2-35 for the following reasons, any one of which is sufficient. First, Beam does not deny that it has collected the excise taxes it paid from the Georgia wholesalers. The party who remits a tax to the State does not have standing to recover the tax in a refund action if the party has collected the tax from his purchaser. *See, e.g., Eimco BSP Services Co. v. Chilivis,* 241 Ga. 263, 268, 244 S.E.2d 829 (1978); *Blackmon v. Georgia Independent Oilmen's Ass'n,* 129 Ga. App. 171, 198 S.E.2d 896 (1973). *See also Atlanta American Motor Hotel Corp. v. Undercofler,* 222 Ga. 295, 298-99, 149 S.E.2d 691 (1966).

In this case, Beam billed to and collected from its Georgia wholesalers all of the distilled spirits taxes which Beam seeks to recover from the State. Thus, Beam is no longer the real party in interest as to those amounts, and Beam lacks standing to recover those amounts from the State under O.C.G.A. § 48-2-35. *See also* cases under the similar federal refund statutes, *United States v. Jefferson Elec. Mfg. Co.,* 291 U.S. 386, 400, 402-03, 54 S.Ct. 443, 78 L.Ed. 859 (1934) (no refund where claimant has reimbursed himself by collecting the tax from the purchaser); *Travel Industries of Kansas, Inc. v. United States,* 425 F.2d 1297, 1300 (10th Cir. 1970); *Sharp & Dohme, Inc. v. United*

States, 144 F.2d 456, 458-59 (3rd Cir. 1944); *Lit v. United States,* 18 F.Supp. 435, 439 (E.D. Pa. 1937).

Beam is not entitled in equity to a double recovery or to recover a windfall to the detriment of the State of Georgia, especially when the State justifiably relied upon the validity of Beam's payments and expended them in good faith for public programs which benefitted both Beam and other citizens and businesses in Georgia. This is especially true here where since 1939 Georgia's distilled spirits tax statute had been held and understood to be constitutional under the Commerce Clause. *See Scott v. State,* 187 Ga. 702, 2 S.E.2d 65 (1939), *Overruled on other grounds, Blackston v. Ga. Dept. of Natural Resources,* 255 Ga. 15, 334 S.E.2d 679 (1985). Thus, the State's reliance interests, as well as the other equitable considerations present here, are a basis in their own right for denying Beam's refund request. *See Beam, supra; Reich v. Collins, et al.,* Case Nos. S92A00621 and S92A0622, ___ Ga. ___, ___ S.E.2d ___ (Ga. Supreme Ct., Nov. 19, 1992); *American Trucking Ass'n, Inc. v. Smith,* 496 U.S. 167, 219-20, 223, 110 S.Ct. 2323, 110 L.Ed.2d 148 (1990) (explaining *Chevron* equitable test as a remedial principle); *Lemon v. Kurtzman,* 411 U.S. 192, 198-99, 203, 207-09 (1973); *United States v. Estate of Donnelly,* 397 U.S. 286, 296-97 (1969); *Cipriani v. City of Houma,* 395 U.S. 701, 702 (1969); *Federated Muttual* [sic] *Ins. Co. v. DeKalb County,* 255 Ga. 522, 523, 341 S.E.2d 3 (1986); *Flewellen v. Atlanta Casualty Co.,* 250 Ga. 709, 719, 300 S.E.2d 673 (1983); *Adams v. Adams,* 249 Ga. 477, 479, 291 S.E.2d 518 (1982); *Walker v. Walker,* 247 Ga. 502, 503, 277 S.E.2d 45 (1981); *Allan v. Allan,* 236 Ga. 199, 207, 223 S.E.2d 445 (1976).

Second, Beam relies heavily upon *McKesson Corp. v. Florida Alcoholic Beverages & Tobacco Division*, 496 U.S. 18, 110 S.Ct. 2238, 110 L.Ed.2d 17 (1989), asserting that *McKesson* requires a refund as a matter of federal due process. However, *McKesson* involved a *post-Bacchus* State statute which violated "clearly established law" and a State lacking an adequate predeprivation remedy. Under *McKesson*, due process is satisfied by the existence of a predeprivation remedy.[3] *Cambridge State Bank v. James*, 480 N.W.2d 647 (Minn. 1992). Since Georgia provides alcohol taxpayers and licensees with sufficient opportunity to challenge a tax or State action prior to payment or enforcement, *McKesson* does not require a tax refund here under federal due process, especially for amounts already recouped by Beam. Alternatively, even the United States Supreme Court in *McKesson* seemed to indicate that if the facts establish a pass-on and the state law includes a comparable defense, no refund need be granted. 496 U.S. at 49, n.34, 110 S.Ct. at 2257, n.34, 110 L.Ed.2d at 43-44, n.34 (1989).

Third, the outcome here is now required by the Georgia Supreme Court's recent decision in *Recich v. Collins, et al*, Case Nos. S92A00621 and S92A0622, ___ Ga. ___, ___

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[3] Among many other valid predeprivation remedies, the State stresses that plaintiff Beam could obtain injunctive relief prior to paying the tax. Since Beam immediately passes the tax on to the wholesalers and the State has a pass-on defense to any remedy at law, this arguably creates the necessary prerequisite for an injunction, to-wit: lack of an adequate remedy at law. The State's pass-on defense arguably creates a catch 22 position for the taxpayer and ameliorates the taxpayer's otherwise adequate remedy at law under the tax refund statute.

S.E.2d ___ (Ga. Supreme Ct., Nov. 19, 1992). In *Reich*, the Georgia Supreme Court held that federal retirees were not entitled to a refund of income taxes under O.C.G.A. § 48-2-35, even though the State collected those taxes under an unconstitutional statute. The Georgia Supreme Court decided that the language of the tax refund statute referring to refunds of taxpayer's taxes "erroneously or illegally assessed and collected from him under the laws of this State" (a) applies only where the State erroneously or illegally collects a tax under a valid law, and (b) does not apply where the State collects a tax under a law subsequently declared to be unconstitutional. The Georgia Supreme Court held that its ruling (that the tax statute in O.C.G.A. § 47-7-27 taxing federal retirement benefits was unconstitutional) must be applied retroactively to the *Reich* plaintiffs under *Barker v. Kansas*, ___ U.S. ___, 112 S.Ct. 1619, ___ L.Ed.2d ___ (1992). However, the Georgia Supreme Court then held that the tax refund statute in O.C.G.A. § 48-2-35 did not apply to the *Reich* facts where taxes were collected under a law subsequently declared unconstitutional.

Plaintiff Beam stresses that the tax refund statute nowhere makes a distinction between valid or invalid laws, that an unconstitutional law is an illegal law, that a tax collected under an illegal law is illegally collected, that the *Reich* taxpayers were not vendor/taxpayers like Beam, and that the final outcome of the *Reich* appeals remains to be seen. Even if plaintiff Beam is correct, until then *Reich* is the law of Georgia, and this trial court is bound to follow *Reich*, which holds that O.C.G.A. § 48-2-35 does not apply to taxes collected from taxpayers, like Beam, under a tax statute, like O.C.G.A.

§ 3-4-60, subsequently held to be unconstitutional. in addition, even if *Reich* is ultimately reversed by the United States Supreme Court (like *Beam* was here), this case involves the pass-on defense, not present in *Reich*, which alone bars plaintiff Beam's tax refund.[4]

III. AFFIDAVITS

The parties have filed myriad motions and objections to each other's multiple Affidavits. Many of the Affidavits recite evidence not material to the Court's rulings herein.

As for plaintiff's objections to Affidavits filed by defendants, the Court denies plaintiff's Motion to Strike and Objections to the Affidavit of Herman Miller, especially regarding the paragraphs indicating that Beam recouped the taxes in issue from its wholesalers. Defendants, as movants, have introduced evidence of recoupment and Beam has nowhere denied its accuracy. Instead, Beam claims that these purported facts were immaterial and that defendants' evidence about Beam's recoupment was not competent evidence. Given all the facts and circumstances herein, the Court finds Mr. Miller's Affidavit is competent evidence, especially since certain underlying records have been destroyed.

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[4] The State also contends that O.C.G.A. § 48-2-35 does not apply to Beam's taxes because a refund or credit for alcohol taxes may be brought under only the Alcohol Code in title 3, rather than the Revenue and Taxation Code in Title 48. *See* O.C.G.A. §§ 3-2-13 and 3-2-14. *Reich* pretermits the need to reach this issue.

As for the remaining Affidavits filed by defendants, the Court DENIES plaintiff's Motion to Strike and Objections to the Affidavits of T. Jerry Jackson, Tim Burgess, Winford Poitevint, Carolyn Hudson, Donald M. Leebern, Ed Foltz, and David Runnion. Alternatively, even assuming *arguendo* that all seven of these Affidavits filed by the defendants were struck, the Court's rulings are still supported by the record herein.

As for defendants' objections to all Affidavits filed by plaintiff, the Court will assume *arguendo* that all Affidavits filed by plaintiff are legally sufficient and DENY defendants' Objections to all affidavits filed by plaintiff. Even assuming *arguendo* that all Affidavits filed by plaintiff are legally sufficient, the Court's rulings herein remain the same.

IV. CONCLUSION

In conclusion, the Court DENIES plaintiff's Motion for Summary Judgment on plaintiff's Complaint and GRANTS defendants' Motions for Summary Judgment on plaintiff's Complaint. The Court finds that there are no genuine issues of material fact and that defendants are entitled to judgment on plaintiff's Complaint as a matter of law. Pursuant to O.C.G.A. § 9-11-54, the Court finds that there is no just reason for delay and directs entry of final judgment in favor of the defendants on plaintiff's Complaint.

IT IS HEREBY ORDERED, this 11th day of February, 1993.

/s/ Frank M. Hull
FRANK M. HULL
Judge, Fulton Superior Court
Atlanta Judicial Circuit

Copies to:

John L. Taylor, Jr.
Vincent, Chorey, Taylor & Feil
Suite 1700, The Lenox Building
3399 Peachtree Road, N.E.
Atlanta, Georgia 30326

Morton Siegel
Richard Schoenstadt
Siegel, Moses, Schoenstadt & Webster
10 East Huron Street
Chicago, Illinois 60611
Attorneys for Plaintiff James B. Beam Distilling Co.

David A. Runnion
The Department of Law
132 State Judicial Building
Atlanta, Georgia 30334
Attorney for Defendants

APPENDIX C

THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

JAMES B. BEAM DISTILLING CO., Plaintiff v. STATE OF GEORGIA, ZELL MILLER, individually and as Governor of the State of Georgia, MARCUS E. COLLINS, individually and as Georgia State Revenue Commissioner, and CLAUDE L. VICKERS, individually and as Director of the Fiscal Division of the Department of Administrative Services, Defendants	CIVIL ACTION FILE NO. D-42527 (Filed April 6, 1993) ORDER

This case is before the Court on plaintiff James B. Beam Distilling Co.'s Motion for Summary Judgment on plaintiff's Amendment to Complaint and Second Amendment to Complaint (filed February 26, 1993), and on defendants' Motion for Summary Judgment on plaintiff's Amendment to Complaint and Second Amendment to Complaint (filed March 19, 1993). All parties have stipulated that these Cross-Motions for Summary Judgment are now ready for decision. The defendants have withdrawn their request for a hearing on these Cross-Motions.

After reviewing and considering all matters of record, the Court finds that there is no genuine issue as to any material fact regarding these Amendments to the Complaint. First, the Court's Final Judgment of February 11, 1993 pretermits the need to reach the interest claim in the first Amendment to the Complaint and the attorney's fees claim in the Second Amendment to the Complaint. Secondly, plaintiff's arguments on the remaining claims in the Second Amendment, i.e., that plaintiff has a constitutional right to a refund or other damages remedy, are based upon arguments which have previously been considered and rejected by the Court. The Court adopts its prior ruling of February 11, 1993, wherein the Court held that there is no constitutional violation in defendant's denial of plaintiff's claim for a refund in this case.

NOW, THEREFORE, the Court hereby DENIES plaintiff James B. Beam Distilling Co.'s Motion for Summary Judgment on its Amendment to Complaint and its Second Amendment to Complaint, and GRANTS defendants' Motion for Summary Judgment on plaintiff's Amendment to Complaint and Second Amendment to Complaint. The Court enters summary judgment in favor of defendants on plaintiff's Amendment to Complaint and Second Amendment to Complaint. This Order constitutes a final adjudication of all matters outstanding in this action. The Court hereby directs entry of Final Judgment in favor of defendants on plaintiff's Complaint, Amendment to Complaint and Second Amendment to Complaint, and finds that there is no just reason for further delay.

IT IS HEREBY ORDERED, this 6th day of April, 1993.

/s/ Frank M. Hull
FRANK M. HULL
Judge, Fulton Superior Court
Atlanta Judicial Circuit

Copies to:

John L. Taylor, Jr.
Vincent, Chorey, Taylor & Feil
Suite 1700, The Lenox Building
3399 Peachtree Road, N.E.
Atlanta, Georgia 30326

Morton Siegel
Richard Schoenstadt
Siegel, Moses, Schoenstadt & Webster
10 East Huron Street
Chicago, Illinois 60611
Attorneys for Plaintiff James B. Beam Distilling Co.

David A. Runnion
The Department of Law
40 Capitol Square
Atlanta, Georgia 30334-1300
Attorney for Defendants

APPENDIX D

JAMES B. BEAM DISTILLING COMPANY, Petitioner

v.

GEORGIA et al.

United States Supreme Court

No. 89-680.

Argued Oct. 30, 1990.

Decided June 20, 1991.

___ U.S. ___, 111 S.Ct. 2439 (1991)

Justice SOUTER announced the judgment of the Court, and delivered an opinion in which Justice STEVENS joins.

The question presented is whether our ruling in *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 104 S.Ct. 3049, 82 L.Ed.2d 200 (1984), should apply retroactively to claims arising on facts antedating that decision. We hold that application of the rule in that case requires its application retroactively in later cases.

I

Prior to its amendment in 1985, Georgia state law imposed an excise tax on imported alcohol and distilled spirits at a rate double that imposed on alcohol and distilled spirits manufactured from Georgia-grown products. See Ga.Code Ann. § 3-4-60 (1982). In 1984, a Hawaii statute that similarly distinguished between imported and local alcoholic products was held in *Bacchus* to violate the Commerce Clause. *Bacchus, supra*, at 273, 104 S.Ct., at 3056. It proved no bar to our finding of unconstitutionality that the discriminatory tax involved intoxicating liquors, with respect to which the States have

heightened regulatory power under the Twenty-first Amendment. *Id.*, at 276, 104 S.Ct., at 3057.

In *Bacchus'* wake, petitioner, a Delaware corporation and Kentucky bourbon manufacturer, claimed Georgia's law likewise inconsistent with the Commerce Clause, and sought a refund of $2.4 million, representing not only the differential taxation but the full amount it had paid under § 3-4-60 for the years 1982, 1983, and 1984. Georgia's Department of Revenue failed to respond to the request, and Beam thereafter brought a refund action against the State in the Superior Court of Fulton County. On cross-motions for summary judgment, the trial court agreed that § 3-4-60 could not withstand a *Bacchus* attack for the years in question, and that the tax had therefore been unconstitutional. Using the analysis described in this Court's decision in *Chevron Oil Co. v. Huson*, 404 U.S. 97, 92 S.Ct. 349, 30 L.Ed.2d 296 (1971), the court nonetheless refused to apply its ruling retroactively. It therefore denied petitioner's refund request.

The Supreme Court of Georgia affirmed the trial court in both respects. The court held the pre-1985 version of the statute to have violated the Commerce Clause as, in its words, an act of "simple economic protectionism." See 259 Ga. 363, 364, 382 S.E.2d 95, 96 (1989) (citing *Bacchus*). But it, too, applied that finding on a prospective basis only, in the sense that it declined to declare the State's application of the statute unconstitutional for the years in question. The court concluded that but for *Bacchus* its decision on the constitutional question would have established a new rule of law by overruling past precedent, see *Scott v. State*, 187 Ga. 702, 2 S.E.2d 65 (1939) (upholding predecessor to § 3-4-60 against Commerce Clause objection), upon which the litigants may justifiably have relied. See 259 Ga., at 365, 382 S.E.2d, at

96. That reliance, together with the "unjust results" that would follow from retroactive application, was thought by the court to satisfy the *Chevron Oil* test for prospectivity. To the dissenting argument of two justices that a statute found unconstitutional is unconstitutional *ab initio*, the court observed that while it had " 'declared statutes to be void from their inception when they were contrary to the Constitution at the time of enactment, . . . those decisions are not applicable to the present controversy, as the original . . . statute, when adopted, was not violative of the Constitution under the court interpretations of that period.' " 259 Ga., at 366, 382 S.E.2d, at 97 (quoting *Adams v. Adams*, 249 Ga. 477, 478-479, 291 S.E.2d 518, 520 (1982)).

Beam sought a writ of certiorari from the Court on the retroactivity question.[1] We granted the petition, 496 U.S. ___, 110 S.Ct. 2616, 110 L.Ed.2d 637 (1990), and now reverse.

II

In the ordinary case no question of retroactivity arises. Courts are as a general matter in the business of applying settled principles and precedents of law to the disputes that come to bar. See Mishkin, Foreword: The High Court, The Great Writ, and the Due Process of Time

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[1] Although petitioner expends some effort, see Brief for Petitioner 5-8, in asserting the unconstitutionality under *Bacchus* of the Georgia law as amended, see Ga.Code Ann. § 3-4-60 (1990), an argument rejected by the Georgia Supreme Court in *Heublein, Inc. v. State*, 256 Ga. 578, 351 S.E.2d 190 (1987), that issue is neither before us nor relevant to the issue that is.

and Law, 79 Harv.L.Rev. 56, 60 (1965). Where those principles and precedents antedate the events on which the dispute turns, the court merely applies legal rules already decided, and the litigant has no basis on which to claim exemption from those rules.

It is only when the law changes in some respect that an assertion of nonretroactivity may be entertained, the paradigm case arising when a court expressly overrules a precedent upon which the contest would otherwise be decided differently and by which the parties may previously have regulated their conduct. Since the question is whether the court should apply the old rule or the new one, retroactivity is properly seen in the first instance as a matter of choice of law, "a choice . . . between the principle of forward operation and that of relation backward." *Great Northern R. Co. v. Sunburst Oil & Refining Co.*, 287 U.S. 358, 364, 53 S.Ct. 145, 148, 77 L.Ed. 360 (1932). Once a rule is found to apply "backward," there may then be a further issue of remedies, *i.e.*, whether the party prevailing under a new rule should obtain the same relief that would have been awarded if the rule had been an old one. Subject to possible constitutional thresholds, see *McKesson Corp. v. Florida Alcoholic Beverages and Tobacco Div.*, 496 U.S. ___, 110 S.Ct. 2238, 110 L.Ed.2d 17 (1990), the remedial inquiry is one governed by state law, at least where the case originates in state court. See *American Trucking Assns., Inc. v. Smith*, 496 U.S. ___, ___, 110 S.Ct. 2323, ___, 110 L.Ed.2d 148 (1990) (STEVENS, J., dissenting). But the antecedent choice-of-law question is a federal one where the rule at issue itself derives from federal law, constitutional or otherwise. See *Smith, supra*, at ___, 110 S.Ct., at ___ (plurality opinion); cf. *United States v.*

Estate of Donnelly, 397 U.S. 286, 297, n., 90 S.Ct. 1033, 1039, n., 25 L.Ed.2d 312 (1970) (Harlan, J., concurring).

As a matter purely of judicial mechanics, there are three ways in which the choice-of-law problem may be resolved. First, a decision may be made fully retroactive, applying both to the parties before the court and to all others by and against whom claims may be pressed, consistent with res judicata and procedural barriers such as statutes of limitations. This practice is overwhelmingly the norm, see *Kuhn v. Fairmont Coal Co.*, 215 U.S. 349, 372, 30 S.Ct. 140, 148, 54 L.Ed. 228 (Holmes, J., dissenting), and is in keeping with the traditional function of the courts to decide cases before them based upon their best current understanding of the law. See *Mackey v. United States*, 401 U.S. 667, 679, 91 S.Ct. 1160, 1173, 28 L.Ed.2d 404 (1971) (Harlan, J., concurring in judgments in part and dissenting in part). It also reflects the declaratory theory of law, see *Smith, supra*, at ___, 110 S.Ct., at ___ (1990) (SCALIA, J., concurring in judgment); *Linkletter v. Walker*, 381 U.S. 618, 622-623, 85 S.Ct. 1731, 1733-1734, 14 L.Ed.2d 601 (1965), according to which the courts are understood only to find the law, not to make it. But in some circumstances retroactive application may prompt difficulties of a practical sort. However much it comports with our received notions of the judicial role, the practice has been attacked for its failure to take account of reliance on cases subsequently abandoned, a fact of life if not always one of jurisprudential recognition. See, *e.g.*, *Mosser v. Darrow*, 341 U.S. 267, 276, 71 S.Ct. 680, 684, 95 L.Ed. 927 (1951) (Black, J., dissenting).

Second, there is the purely prospective method of overruling, under which a new rule is applied neither to

the parties in the law-making decision nor to those others against or by whom it might be applied to conduct or events occurring before that decision. The case is decided under the old law but becomes a vehicle for announcing the new, effective with respect to all conduct occurring after the date of that decision. This Court has, albeit infrequently, resorted to pure prospectivity, see *Chevron Oil Co. v. Huson*, 404 U.S. 97, 92 S.Ct. 349, 30 L.Ed.2d 296 (1971); *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 88, 102 S.Ct. 2858, 2880, 73 L.Ed.2d 598 (1982); *Buckley v. Valeo*, 424 U.S. 1, 142-143, 96 S.Ct. 612, 693, 46 L.Ed.2d 659 (1976); *England v. Louisiana State Bd. of Medical Examiners*, 375 U.S. 411, 422, 84 S.Ct. 461, 468, 11 L.Ed.2d 440 (1964); see also *Smith, supra*, at ___, n. 11, 110 S.Ct., at 2354, n. 11 (STEVENS, J., dissenting); *Linkletter, supra*, 381 U.S., at 628, 85 S.Ct., at 1737, although in so doing it has never been required to distinguish the remedial from the choice-of-law aspect of its decision. See *Smith, supra*, at ___, 110 S.Ct., at ___ (STEVENS, J., dissenting). This approach claims justification in its appreciation that "[t]he past cannot always be erased by a new judicial declaration," *Chicot County Drainage District v. Baxter State Bank*, 308 U.S. 371, 374, 60 S.Ct. 317, 318, 84 L.Ed. 329 (1940), see also *Lemon v. Kurtzman*, 411 U.S. 192, 199, 93 S.Ct. 1463, 1468, 36 L.Ed.2d 151 (1973) (plurality opinion), and that to apply the new rule to parties who relied on the old would offend basic notions of justice and fairness. But this equitable method has its own drawback: it tends to relax the force of precedent, by minimizing the costs of overruling, and thereby allows the courts to act with a freedom comparable to that of legislatures. See *United States v.*

Johnson, 457 U.S. 537, 554-555, 102 S.Ct. 2579, 2589-2590, 73 L.Ed.2d 202 (1982); *James v. United States*, 366 U.S. 213, 225, 81 S.Ct. 1052, 1058, 6 L.Ed.2d 246 (1961) (Black, J., dissenting).

Finally, a court may apply a new rule in the case in which it is pronounced, then return to the old one with respect to all others arising on facts predating the pronouncement. This method, which we may call modified, or selective, prospectivity, enjoyed its temporary ascendancy in the criminal law during a period in which the Court formulated new rules, prophylactic or otherwise, to insure protection of the rights of the accused. See e.g., *Johnson v. New Jersey*, 384 U.S. 719, 86 S.Ct. 1772, 16 L.Ed.2d 882 (1966); *Stovall v. Denno*, 388 U.S. 293, 297, 87 S.Ct. 1967, 1970, 18 L.Ed.2d 1199 (1967); *Daniel v. Louisiana*, 420 U.S. 31, 95 S.Ct. 704, 42 L.Ed.2d 790 (1975); see also *Smith, supra*, at ___, 110 S.Ct., at ___ ("During the period in which much of our retroactivity doctrine evolved, most of the Court's new rules of criminal procedure had expanded the protections available to criminal defendants"). On the one hand, full retroactive application of holdings such as those announced in *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966); *Escobedo v. Illinois*, 378 U.S. 478, 84 S.Ct. 1758, 12 L.Ed.2d 977 (1964); and *Katz v. United States*, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967), would have "seriously disrupt[ed] the administration of our criminal laws[,] . . . requir[ing] the retrial or release of numerous prisoners found guilty by trustworthy evidence in conformity with previously announced constitutional standards." *Johnson, supra*, 384 U.S., at 731, 86 S.Ct., at 1780. On the other hand, retroactive application could hardly have been denied the litigant in the law-changing decision

itself. A criminal defendant usually seeks one thing only on appeal, the reversal of his conviction; future application would provide little in the way of solace. In this context, without retroactivity at least to the first successful litigant, the incentive to seek review would be diluted if not lost altogether.

But selective prospectivity also breaches the principle that litigants in similar situations should be treated the same, a fundamental component of *stare decisis* and the rule of law generally. See R. Wasserstrom, The Judicial Decision 69-72 (1961). "We depart from this basic judicial tradition when we simply pick and choose from among similarly situated defendants those who alone will receive the benefit of a 'new' rule of constitutional law." *Desist v. United States*, 394 U.S. 244, 258-259, 89 S.Ct. 1030, 1039, 22 L.Ed.2d 248 (1969) (Harlan, J., dissenting); see also Von Moschzisker, Stare Decisis in Courts of Last Resort, 37 Harv.L.Rev. 409, 425 (1924). For this reason, we abandoned the possibility of selective prospectivity in the criminal context in *Griffith v. Kentucky*, 479 U.S. 314, 328, 107 S.Ct. 708, 716, 93 L.Ed.2d 649 (1987), even where the new rule constituted a "clear break" with previous law, in favor of completely retroactive application of all decisions to cases pending on direct review. Though *Griffith*, was held not to dispose of the matter of civil retroactivity, see *id.*, at 322, n. 8, 107 S.Ct., at 712, n. 8, selective prospectivity appears never to have been endorsed in the civil context. *Smith*, 496 U.S. at ___, 110 S.Ct., at ___ (plurality opinion). This case presents the issue.

III

Both parties have assumed the applicability of the *Chevron Oil* test, under which the Court has accepted prospectivity (whether in the choice-of-law or remedial sense, it is not clear) where a decision displaces a principle of law on which reliance may reasonably have been placed, and where prospectivity is on balance warranted by its effect on the operation of the new rule and by the inequities that might otherwise result from retroactive application. See *Chevron Oil*, 404 U.S., at 106-107, 92 S.Ct., at 355. But we have never employed *Chevron Oil* to the end of modified civil prospectivity.

The issue is posed by the scope of our disposition in *Bacchus*. In most decisions of this Court, retroactivity both as to choice of law and as to remedy goes without the saying. Although the taxpaying appellants prevailed on the merits of their Commerce Clause claim, however, the *Bacchus* Court did not grant outright their request for a refund of taxes paid under the law found unconstitutional. Instead, we remanded the case for consideration of the State's arguments that appellants were "not entitled to refunds since they did not bear the economic incidence of the tax but passed it on as a separate addition to the price that their customers were legally obligated to pay." *Bacchus*, 468 U.S., at 276-277, 104 S.Ct., at 3058. "These refund issues, . . . essentially issues of remedy," had not been adequately developed on the record nor passed upon by the state courts below, and their consideration may have been intertwined with, or obviated by, matters of state law. *Id.*, at 277, 104 S.Ct. at 3058.

Questions of remedy aside, *Bacchus* is fairly read to hold as a choice of law that its rule should apply retroactively to the litigants then before the Court. Because the *Bacchus* opinion did not reserve the question whether its holding should be applied to the parties before it, compare *American Trucking Assns., Inc. v. Scheiner*, 483 U.S. 266, 297-298, 107 S.Ct. 2829, 2847-2848, 97 L.Ed.2d 226 (1987) (remanding case to consider whether ruling "should be applied retroactively and to decide other remedial issues"), it is properly understood to have followed the normal rule of retroactive application in civil cases. If the Court were to have found prospectivity as a choice-of-law matter, there would have been no need to consider the pass-through defense; if the Court had reserved the issue, the terms of the remand to consider "remedial" issues would have been incomplete. Indeed, any consideration of remedial issues necessarily implies that the precedential question has been settled to the effect that the rule of law will apply to the parties before the Court. See *McKesson*, 496 U.S., at ___, 110 S.Ct., at ___ (pass-through defense considered as remedial question). Because the Court in *Bacchus* remanded the case solely for consideration of the pass-through defense, it thus should be read as having retroactively applied the rule there decided.[2] See also *Williams v. Vermont*, 472 U.S. 14, 28, 105

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[2] In fact, the state defendant in *Bacchus* argued for pure prospectivity under the criteria set forth in *Chevron Oil Co. v. Huson*, 404 U.S. 97, 92 S.Ct. 349, 30 L.Ed.2d 296 (1971). See Brief for Appellee in *Bacchus Imports Ltd. v. Dias*, O.T.1983, No. 82-1565, p. 19. It went on to argue that *"even if"* the challenged tax were held invalid *and* the decision were not limited to prospective application, the challengers should not be entitled to

S.Ct. 2465, 2474, 86 L.Ed.2d 11 (1985); *Exxon Corp. v. Eagerton*, 462 U.S. 176, 196-197, 103 S.Ct. 2296, 2308-2309, 76 L.Ed.2d 497 (1983); cf. *Davis v. Michigan Dept. of Treasury*, 498 U.S. 803, 817, 109 S.Ct. 1500, 1508, 103 L.Ed.2d 891 (1989).

Bacchus thus applied its own rule, just as if it had reversed and remanded without further ado, and yet of course the Georgia courts refused to apply that rule with respect to the litigants in this case. Thus, the question is whether it is error to refuse to apply a rule of federal law retroactively after the case announcing the rule has already done so. We hold that it is, principles of equality and *stare decisis* here prevailing over any claim based on a *Chevron Oil* analysis.

Griffith cannot be confined to the criminal law. Its equality principle, that similarly situated litigants should be treated the same, carries comparable force in the civil context. See *United States v. Estate of Donnelly*, 397 U.S., at 296, 90 S.Ct., at 1039 (Harlan, J., concurring). Its strength is in fact greater in the latter sphere. With respect to retroactivity in criminal cases, there remains even now the disparate treatment of those cases that come to the Court directly and those that come here in collateral proceedings. See *Griffith, supra*, 479 U.S., at 331-332, 107

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refunds because any taxes paid would have been passed through to consumers. *id.*, at 46. Though unnecessary to our ruling here, the prospectivity issue can thus be said actually to have been litigated and by implication actually to have been decided by the Court by the fact of its consideration of the pass-through defense. See *Clemons v. Mississippi*, 494 U.S. ___, ___, n. 3, 110 S.Ct. 1441, 1448, n. 3, 108 L.Ed.2d 725 (1990).

S.Ct., at 717-718 (WHITE J., dissenting). Whereas *Griffith* held that new rules must apply retroactively to all criminal cases pending on direct review, we have since concluded that new rules will not relate back to convictions challenged on habeas corpus. *Teague v. Lane*, 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989). No such difficulty exists in the civil arena, in which there is little opportunity for collateral attack of final judgments.

Nor is selective prospectivity necessary to maintain incentives to litigate in the civil context as it may have been in the criminal before *Griffith's* rule of absolute retroactivity. In the civil context, "even a party who is deprived of a full retroactive benefit of a new decision may receive some relief." *Smith*, 496 U.S., at ___, 110 S.Ct., at ___. Had the petitioners in *Bacchus* lost their bid for retroactivity, for example, they would nonetheless have won protection from the future imposition of discriminatory taxes, and the same goes for the petitioner here. Assuming that pure prospectivity may be had at all, moreover, its scope must necessarily be limited to a small number of cases; its possibility is therefore unlikely to deter the broad class of prospective challengers of civil precedent. See generally Currier, Time and Change in Judge-Made Law: Prospective Overruling, 51 Va.L.Rev. 201, 215 (1965).

Of course, retroactivity in civil cases must be limited by the need for finality, see *Chicot County Drainage District v. Baxter State Bank*, 308 U.S. 371, 60 S.Ct. 317, 84 L.Ed. 329 (1940); once suit is barred by res judicata or by statutes of limitation or repose, a new rule cannot reopen the door already closed. It is true that one might deem the distinction arbitrary, just as some have done in the

criminal context with respect to the distinction between direct review and habeas: why should someone whose failure has otherwise become final not enjoy the next day's new rule, from which victory would otherwise spring? It is also objected that in civil cases unlike criminal there is more potential for litigants to freeload on those without whose labor the new rule would never have come into being. (Criminal defendants are already potential litigants by virtue of their offense, and invoke retroactivity only by way of defense; civil beneficiaries of new rules may become litigants as a result of the law change alone, and use it as a weapon.) That is true of the petitioner now before us, which did not challenge the Georgia law until after its fellow liquor distributors had won their battle in *Bacchus*. To apply the rule of *Bacchus* to the parties in that case but not in this one would not, therefore, provoke Justice Harlan's attack on modified prospectivity as "[s]imply fishing one case from the stream of appellate review, using it as a vehicle for pronouncing new constitutional standards, and then permitting a stream of similar cases to flow by unaffected by that new rule." *Mackey*, 401 U.S., at 679, 91 S.Ct., at 1173 (Harlan, J., concurring in judgments in part and dissenting in part); see also *Smith*, *supra*, at ___-___, 110 S.Ct., at ___-___ (STEVENS, J., dissenting). Beam had yet to enter the waters at the time of our decision in *Bacchus*, and yet we give it *Bacchus'* benefit. Insofar as equality drives us, it might be argued that the new rule should be applied to those who had toiled and failed, but whose claims are now precluded by res judicata; and that it should not be applied to those who only exploit others' efforts by litigating in the new rule's wake.

As to the former, independent interests are at stake; and with respect to the latter, the distinction would be too readily and unnecessarily overcome. While those whose claims have been adjudicated may seek equality, a second chance for them could only be purchased at the expense of another principle. " 'Public policy dictates that there be an end of litigation; that those who have contested an issue shall be bound by the result of that contest, and that matters once tried shall be considered forever settled as between the parties.' " *Federated Department Stores v. Moitie*, 452 U.S. 394, 401, 101 S.Ct. 2424, 2429, 69 L.Ed.2d 103 (1981) (quoting *Baldwin v. Iowa State Traveling Men's Assn.*, 283 U.S. 522, 525, 51 S.Ct. 517, 518, 75 L.Ed. 1244 (1931)). Finality must thus delimit equality in a temporal sense, and we must accept as a fact that the argument for uniformity loses force over time. As for the putative hangers-on, they are merely asserting a right that the Court has told them is theirs in law, that the Court has not deemed necessary to apply on a prospective basis only, and that is not otherwise barred by state procedural requirements. They cannot be characterized as free-loaders any more than those who seek vindication under a new rule on facts arising after the rule's announcement. Those in each class rely on the labors of the first successful litigant. We might, of course, limit retroactive application to those who at least tried to fight their own battles by litigating before victory was certain. To this possibility, it is enough to say that distinguishing between those with cases pending and those without would only serve to encourage the filing of replicative suits when this or any other appellate court created the possibility of a new rule by taking a case for review.

Nor, finally, are litigants to be distinguished for choice-of-law purposes on the particular equities of their claims to prospectivity: whether they actually relied on the old rule and how they would suffer from retroactive application of the new. It is simply in the nature of precedent, as a necessary component of any system that aspires to fairness and equality, that the substantive law will not shift and spring on such a basis. To this extent, our decision here does limit the possible applications of the *Chevron Oil* analysis, however irrelevant *Chevron Oil* may otherwise be to this case. Because the rejection of modified prospectivity precludes retroactive application of a new rule to some litigants when it is not applied to others, the *Chevron Oil* test cannot determine the choice of law by relying on the equities of the particular case. See *Simpson v. Director, Office of Workers' Compensation Programs, United States Dept. of Labor*, 681 F.2d 81, 85-86 (CA1 1982), cert. denied *sub nom. Bath Iron Works Corp. v. Director, Office of Workers' Compensation Programs, United States Dept. of Labor*, 459 U.S. 1127, 103 S.Ct. 762, 74 L.Ed.2d 977 (1983); see also Note, 1985 U.Ill.L.Rev.. 117, 131-132. Once retroactive application is chosen for any assertedly new rule, it is chosen for all others who might seek its prospective application. The applicability of rules of law are not to be switched on and off according to individual hardship; allowing relitigation of choice-of-law issues would only compound the challenge to the stabilizing purpose of precedent posed in the first instance by the very development of "new" rules. Of course, the generalized enquiry permits litigants to assert, and the courts to consider, the equitable and reliance interests of parties absent but similarly situated. Conversely, nothing we say

here precludes consideration of individual equities when deciding remedial issues in particular cases.

IV

The grounds for our decision today are narrow. They are confined entirely to an issue of choice of law: when the Court has applied a rule of law to the litigants in one case it must do so with respect to all others not barred by procedural requirements or res judicata. We do not speculate as to the bounds or propriety of pure prospectivity.

Nor do we speculate about the remedy that may be appropriate in this case; remedial issues were neither considered below nor argued to this Court, save for an effort by petitioner to buttress its claim by reference to our decision last Term in *McKesson*. As we have observed repeatedly, federal "issues of remedy . . . may well be intertwined with, or their consideration obviated by, issues of state law." *Bacchus*, 468 U.S., at 277, 104 S.Ct., at 3058. Nothing we say here deprives respondent of his opportunity to raise procedural bars to recovery under state law or demonstrate reliance interests entitled to consideration in determining the nature of the remedy that must be provided, a matter with which *McKesson* did not deal. See *Estate of Donnelly*, 397 U.S., at 296, 90 S.Ct., at 1039 (Harlan, J., concurring); cf. *Lemon*, 411 U.S., at 203, 93 S.Ct., at 1471.

The judgment is reversed, and the case is remanded for further proceedings.

It is so ordered.

Justice WHITE, concurring in the judgment.

I agree with Justice SOUTER that the opinion in *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 104 S.Ct. 3049, 82 L.Ed.2d 200 (1984), may reasonably be read as extending the benefit of the judgment in that case to the appellant Bacchus Imports. I also agree that the decision is to be applied to other litigants whose cases were not final at the time of the *Bacchus* decision. This would be true under any one of several suppositions. First, if the Court in that case thought its decision to have been reasonably foreseeable and hence not a new rule, there would be no doubt that it would be retroactive to all similarly situated litigants. *Chevron Oil Co. v. Huson*, 404 U.S. 97, 92 S.Ct. 349, 30 L.Ed.2d 296 (1971), would not then have been implicated. Second, even if retroactivity depended upon consideration of the *Chevron Oil* factors, the Court may have thought that retroactive application was proper. Here, it should be noted that although the dissenters in *Bacchus* – including Justice O'CONNOR – agreed that the Court erred in deciding the Twenty-first Amendment issue against the State, they did not argue that the Court erred in giving the appellant the benefit of its decision. *Bacchus supra*, at 278, 104 S.Ct., at 3059 (STEVENS, J., dissenting). Third, even if – as Justice O'CONNOR now argues – the Court was quite wrong in doing so, *post*, at 2452-2456, that is water over the dam, irretrievably it seems to me. There being no precedent in civil cases applying a new rule to the parties in the case but not to others similarly situated,* and *Griffith v. Kentucky*, 479

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* *See Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 88, 102 S.Ct. 2858, 2880, 73 L.Ed.2d 598 (1982); *Buckley v. Valeo*, 424 U.S. 1, 142-143, 96 S.Ct. 612, 693, 46 L.Ed.2d 659 (1976); *Chevron Oil Co. v. Huson*, 404 U.S. 97, 92 S.Ct. 349, 30

U.S. 314, 328, 107 S.Ct. 708, 716, 93 L.Ed.2d 649 (1987), having overruled such a practice in criminal cases (a decision from which I dissented and still believe wrong, but which I now follow on the basis of *stare decisis*), I agree that the petitioner here should have the benefit of *Bacchus*, just as Bacchus Imports did. Hence I concur in the judgment of the Court.

Nothing in the above, however, is meant to suggest that I retreat from those opinions filed in this Court which I wrote or joined holding or recognizing that in proper cases a new rule announced by the Court will not be applied retroactively, even to the parties before the Court. See, e.g., *Cipriano v. City of Houma*, 395 U.S. 701, 706, 89 S.Ct. 1897, 1900, 23 L.Ed.2d 647 (1969). This was what Justice Stewart wrote for the Court in *Chevron Oil*, summarizing what was deemed to be the essence of those cases. *Chevron Oil, supra*, at 105-109, 92 S.Ct., at 355-357. This was also what Justice O'CONNOR wrote for the plurality in *American Trucking Assns., Inc. v. Smith*, 496 U.S. ___, 110 S.Ct. 2323, 110 L.Ed.2d 148 (1990). I joined that opinion and would not depart from it. Nor, without overruling *Chevron Oil* and those other cases before and after *Chevron Oil*, holding that certain decisions will be applied prospectively only, can anyone sensibly insist on

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L.Ed.2d 296 (1971); *Cipriano v. City of Houma*, 395 U.S. 701, 706, 89 S.Ct. 1897, 1900, 23 L.Ed.2d 647 (1969); *Allen v. State Bd. of Elections*, 393 U.S. 544, 572, 89 S.Ct. 817, 835, 22 L.Ed.2d 1 (1969); *Simpson v. Union Oil Co.*, 377 U.S. 13, 24-25, 84 S.Ct. 1051, 1058-1059, 12 L.Ed.2d 98 (1964); *England v. Louisiana State Bd. of Medical Examiners*, 375 U.S. 411, 422, 84 S.Ct. 461, 468, 11 L.Ed.2d 440 (1964); *Chicot County Drainage Dist. v. Baxter State Bank*, 308 U.S. 371, 374, 60 S.Ct. 317, 318, 84 L.Ed.329 (1940).

automatic retroactivity for any and all judicial decisions in the federal system.

Hence, I do not understand how Justice SOUTER can cite the cases on prospective operation, *ante*, at 2443, and yet say that he need not speculate as to the propriety of pure prospectivity, *ante*, at 2448. The propriety of prospective application of decision in this Court, in both Constitutional and statutory cases, is settled by our prior decisions. To nevertheless "speculate" about the issue is only to suggest that there may come a time when our precedents on the issue will be overturned.

Plainly enough, Justices SCALIA, MARSHALL, and BLACKMUN would depart from our precedents. Justice SCALIA would do so for two reasons, as I read him. *Post*, at ___. First, even though the Justice is not naive enough (nor does he think the Framers were naive enough) to be unaware that judges in a real sense "make" law, he suggests that judges (in an unreal sense, I suppose) should never concede that they do and must claim that they do no more than discover it, hence suggesting that there are citizens who are naive enough to believe them. Second, Justice SCALIA, fearful of our ability and that of other judges to resist the temptation to overrule prior cases, would maximize the injury to the public interest when overruling occurs, which would tend to deter them from departing from established precedent.

I am quite unpersuaded by this line of reasoning and hence concur in the judgment on the narrower ground employed by Justice SOUTER.

Justice BLACKMUN, with whom Justice MARSHALL and Justice SCALIA join, concurring in the judgment.

I join Justice SCALIA's opinion because I agree that failure to apply a newly declared constitutional rule to cases pending on direct review violates basic norms of constitutional adjudication. It seems to me that our decision in *Griffith v. Kentucky*, 479 U.S. 314, 107 S.Ct. 708, 93 L.Ed.2d 649 (1987), makes clear that this Court's function in articulating new rules of decision must comport with its duty to decide only "cases" and "controversies." See U.S. Const., Art. III, § 2, cl. 1. Unlike legislature, we do not promulgate new rules to "be applied prospectively only," as the dissent, *post*, at 2450, and perhaps the Court, would have it. The nature of judicial review constrains us to consider the case that is actually before us, and, if it requires us to announce a new rule, to do so in the context of the case and apply it to the parties who brought us the case to decide. To do otherwise is to warp the role that we, as judges, play in a government of limited powers.

I do not read Justice SCALIA's comments on the division of federal powers to reject the idea expressed so well by the last Justice Harlan that selective application of new rules violates the principle of treating similarly situated defendants the same. See *Mackey v. United States*, 401 U.S. 667, 678-679, 91 S.Ct. 1160, 1172-1173, 28 L.Ed.2d 404 (1971), and *Desist v. United States*, 394 U.S. 244, 258-259, 89 S.Ct. 1030, 1038-1039, 22 L.Ed.2d 248 (1969) (dissenting opinion), on which *Griffith* relied. This rule, which we have characterized as a question of equity, is not the remedial equity that the dissent seems to believe can trump the role of adjudication in our constitutional scheme. See *post*, at 2451. It derives from the integrity of judicial review, which does not justify applying principles

determined to be wrong to litigants who are in or may still come to court. We fulfill our judicial responsibility by requiring retroactive application of each new rule we announce.

Application of new decisional rules does not thwart the principles of *stare decisis*, as the dissent suggests. See *post*, at 2452. The doctrine of *stare decisis* profoundly serves important purposes in our legal system. Nearly a half century ago, Justice Roberts cautioned: "Respect for tribunals must fall when the bar and the public come to understand that nothing that has been said in prior adjudication has force in a current controversy." *Mahnich v. Southern S.S. Co.*, 321 U.S. 96, 113, 64 S.Ct. 455, 463, 88 L.Ed. 561 (1944) (dissenting opinion). The present dissent's view of *stare decisis* would rob the doctrine of its vitality through eliminating the tension between the current controversy and the new rule. By announcing new rules prospectively or by applying them selectively, a court may dodge the *stare decisis* bullet by avoiding the disruption of settled expectations that otherwise prevents us from disturbing our settled precedents. Because it forces us to consider the disruption that our new decisional rules cause, retroactivity combines with *stare decisis* to prevent us from altering the law each time the opportunity presents itself.

Like Justice SCALIA, I conclude that prospectivity, whether "selective" or "pure," breaches our obligation to discharge our constitutional function.

Justice SCALIA, with whom Justice MARSHALL and Justice BLACKMUN join, concurring in the judgment.

I think I agree, as an abstract matter, with Justice SOUTER's reasoning, but that is not what leads me to agree with his conclusion. I would no more say that what he calls "selective prospectivity" is impermissible because it produces inequitable results than I would say that the coercion of confessions is impermissible for that reason. I believe that the one, like the other, is impermissible simply because it is not allowed by the Constitution. Deciding between a constitutional course and an unconstitutional one does not pose a question of choice of law.

If the division of federal powers central to the constitutional scheme is to succeed in its objective, it seems to me that the fundamental nature of those powers must be preserved as that nature was understood when the Constitution was enacted. The Executive, for example, in addition to "tak[ing] Care that the Laws be faithfully executed," Art. II, § 3, has no power to bind private conduct in areas not specifically committed to his control by Constitution or statute; such a perception of "[t]he Executive power" may be familiar to other legal systems, but is alien to our own. So also, I think "[t]he judicial Power of the United States" conferred upon this Court and such inferior courts as Congress may establish, Art. III, § 1, must be deemed to be the judicial power as understood by our common-law tradition. That is the power "to say what the law is," *Marbury v. Madison*, 1 Cranch 137, 177, 2 L.Ed. 60 (1803), not the power to change it. I am not so naive (nor do I think our forebears were) as to be unaware that judges in a real sense "make" law. But they make it *as judges make it*, which is to say *as*

though they were "finding" it – discerning what the law *is*, rather than decreeing what it is today *changed to*, or what it will *tomorrow* be. Of course this mode of action poses "difficulties of a . . . practical sort," *ante*, at 2443, when courts decide to overrule prior precedent. But those difficulties are one of the understood checks upon judicial law making; to eliminate them is to render courts substantially more free to "make new law," and thus to alter in a fundamental way the assigned balance of responsibility and power among the three Branches.

For this reason, and not reasons of equity, I would find both "selective prospectivity" and "pure prospectivity" beyond our power.

Justice O'CONNOR, with whom Chief Justice REHNQUIST and Justice KENNEDY join, dissenting.

The Court extends application of the new rule announced in *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 104 S.Ct. 3049, 82 L.Ed.2d 200 (1984), retroactively to all parties, without consideration of the analysis described in *Chevron Oil Co. v. Huson*, 404 U.S. 97, 92 S.Ct. 349, 30 L.Ed.2d 296 (1971). Justice SOUTER bases this determination on "principles of equality and *stare decisis*." *Ante*, at ___. To my mind, both of these factors lead to precisely the opposite result.

Justice BLACKMUN and Justice SCALIA concur in the judgment of the Court but would abrogate completely the *Chevron Oil* inquiry and hold that all decisions must be applied retroactively in all cases. I explained last Term that such a rule ignores well-settled precedent in which this Court has refused repeatedly to apply new rules retroactively in civil cases. See *American Trucking Assns. v.*

Smith, 496 U.S. ___, ___-___, 110 S.Ct. 2323, 2327-2343, 110 L.Ed.2d 148 (opinion of O'CONNOR, J.). There is no need to repeat that discussion here. I reiterate, however, that precisely because this Court has "the power 'to say what the law is,' *Marbury v. Madison*, 1 Cranch 137, 177, 2 L.Ed. 60 (1803)," *ante*, at 2450 (SCALIA, J., concurring), when the Court changes its mind, the law changes with it. If the Court decides, in the context of a civil case or controversy, to change the law, it must make the subsequent determination whether the new law or the old is to apply to conduct occurring before the law-changing decision. *Chevron Oil* describes our long-established procedure for making this inquiry.

I

I agree that the Court in *Bacchus* applied its rule retroactively to the parties before it. The *Bacchus* opinion is silent on the retroactivity question. Given that the usual course in cases before this Court is to apply the rule announced to the parties in the case, the most reasonable reading of silence is that the Court followed its customary practice.

The *Bacchus* Court erred in applying its rule retroactively. It did not employ the *Chevron Oil* analysis, but should have. Had it done so, the Court would have concluded that the *Bacchus* rule should be applied prospectively only. Justice SOUTER today concludes that, even in the absence of an independent examination of retroactivity, once the Court applies a new rule retroactively to the parties before it, it must thereafter apply the rule retroactively to everyone. I disagree. Without a

determination that retroactivity is appropriate under *Chevron Oil*, neither equality nor *stare decisis* leads to this result.

As to "equality," Justice SOUTER believes that it would be unfair to withhold the benefit of the new rule in *Bacchus* to litigants similarly situated to those who received the benefit in that case. *Ante*, at 2444, 2446. If Justice SOUTER is concerned with fairness, he cannot ignore *Chevron Oil;* the purpose of the *Chevron Oil* test is to determine the equities of retroactive application of a new rule. See *Chevron Oil, supra*, 404 U.S., at 107-108, 92 S.Ct., at 355-356; *Smith, supra*, at ___, 110 S.Ct., at ___. Had the *Bacchus* Court determined that retroactivity would be appropriate under *Chevron Oil*, or had this Court made that determination now, retroactive application would be fair. Where the *Chevron Oil* analysis indicates that retroactivity is not appropriate, however, just the opposite is true. If retractive application was inequitable in *Bacchus* itself, the Court only hinders the cause of fairness by repeating the mistake. Because I conclude that the *Chevron Oil* test dictates that *Bacchus* not be applied retroactively, I would decline the Court's invitation to impose liability on every jurisdiction in the Nation that reasonably relied on pre-*Bacchus* law.

Justice SOUTER also explains that "*stare decisis*" compels its result. *Ante*, at 2446. By this, I assume he means that the retroactive application of the *Bacchus* rule to the parties in that case is itself a decision of the Court to which the Court should now defer in deciding the retroactivity question in this case. This is not a proper application of *stare decisis*. The Court in *Bacchus* applied its rule retroactively to the parties before it without any analysis

of the issue. This tells us nothing about how this case – where the *Chevron Oil* question is squarely presented – should come out.

Contrary to Justice SOUTER's assertions, *stare decisis* cuts the other way in this case. At its core, *stare decisis* allows those affected by the law to order their affairs without fear that the established law upon which they rely will suddenly be pulled out from under them. A decision *not* to apply a new rule retroactively is based on principles of *stare decisis*. By not applying a law-changing decision retroactively, a court respects the settled expectations that have built up around the old law. See, *American Trucking, supra,* at ___-___, 110 S.Ct.,at 2341 (opinion of O'CONNOR, J.) ("prospective overruling allows courts to respect the principle of *stare decisis* even when they are impelled to change the law in light of new understanding"); *id.*, at ___, 110 S.Ct., at 2345 (SCALIA, J., concurring in judgment) (imposition of retroactive liability on a litigant would "*upset that litigant's settled expectations* because the earlier decision for which *stare decisis* effect is claimed . . . overruled prior law. That would turn the doctrine of *stare decisis* against the very purpose for which it exists"). If a *Chevron Oil* analysis reveals, as it does, that retroactive application of *Bacchus* would unjustly undermine settled expectations, *stare decisis* dictates strongly against the Court's holding.

Justice SOUTER purports to have restricted the application of *Chevron Oil* only to a limited extent. *Ante,* at 2447. The effect appears to me far greater. Justice SOUTER concludes that the *Chevron Oil* analysis, if ignored in answering the narrow question of retroactivity as to the parties to a particular case, must be ignored also in

answering the far broader question of retroactivity as to all other parties. But it is precisely in determining general retroactivity that the *Chevron Oil* test is most needed; the broader the potential reach of a new rule, the greater the potential disruption of settled expectations. The inquiry the Court summarized in *Chevron Oil* represents long-standing doctrine on the application of nonretroactivity to civil cases. See *American Trucking, supra,* at ___-___, 110 S.Ct., at ___-___. Justice SOUTER today ignores this well-established precedent, and seriously curtails the *Chevron Oil* inquiry. His reliance upon *stare decisis* in reaching this conclusion becomes all the more ironic.

II

Faithful to this Court's decisions, the Georgia Supreme Court in this case applied the analysis described in *Chevron Oil* in deciding the retroactivity question before it. Subsequently, this Court has gone out of its way to ignore that analysis. A proper application of *Chevron Oil* demonstrates, however, that *Bacchus* should not be applied retroactively.

Chevron Oil describes a three-part inquiry in determining whether a decision of this Court will have prospective effect only:

> "First, the decision to be applied nonretroactively must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied, or by deciding an issue of first impression whose resolution was not clearly foreshadowed. Second, . . . we must . . . weigh the merits and demerits in each case by looking to the prior history of the rule in

> question, its purpose and effect, and whether retrospective operation will further or retard its operation. Finally, we [must] weig[h] the inequity imposed by retroactive application, for [w]here a decision of this Court could produce substantial inequitable results if applied retroactively, there is ample basis in our cases for avoiding the injustice or hardship by a holding of nonretroactivity." 404 U.S., at 106-107, 92 S.Ct., at 355 (citations and internal quotations omitted).

Bacchus easily meets the first criterion. That case considered a Hawaii excise tax on alcohol sales that exempted certain locally produced liquor. The Court held that the tax, by discriminating in favor of local products, violated the Commerce Clause, U.S. Const., Art. I, § 8, cl. 3, by interfering with interstate commerce. 468 U.S., at 273, 104 S.Ct., at 3056. The Court rejected the State's argument that any violation of ordinary Commerce Clause principles was, in the case of alcohol sales, overborne by the State's plenary powers under § 2 of the Twenty-first Amendment to the United States Constitution. That section provides:

> "The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited."

The Court noted that language in some of our earlier opinions indicated that § 2 did indeed give the States broad power to establish the terms under which imported liquor might compete with domestic. See 468 U.S., at 274, and n. 13, 104 S.Ct., at 3057, and n. 13. Nonetheless, the

Court concluded that other cases had by then established "that the [Twenty-first] Amendment did not entirely remove state regulation of alcoholic beverages from the ambit of the Commerce Clause." *Id.*, at 275, 104 S.Ct., at 3057. Relying on *Hostetter v. Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324, 84 S.Ct. 1293, 12 L.Ed.2d 350 (1964), *California Retail Liquor Dealers Assn.v. Midcal Aluminum, Inc.*, 445 U.S. 97, 100 S.Ct. 937, 63 L.Ed.2d 233 (1980), and *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 104 S.Ct. 2694, 81 L.Ed.2d 580 (1984), the Court concluded that § 2 did not protect the State from liability for economic protectionism. 468 U.S., at 275-276, 104 S.Ct., at 3057-3058.

The Court's conclusion in *Bacchus* was unprecedented. Beginning with *State Board of Equalization of California v. Young's Market Co.*, 299 U.S. 59, 57 S.Ct. 77, 81 L.Ed. 38 (1936), an uninterrupted line of authority from this Court held that States need not meet the strictures of the so-called "dormant" or "negative" Commerce Clause when regulating sales and importation of liquor within the State. *Young's Market* is directly on point. There, the Court rejected precisely the argument it eventually accepted in *Bacchus*. The California statute at issue in *Young's Market* imposed a license fee for the privilege of importing beer into the State. The Court concluded that "[p]rior to the Twenty-first Amendment it would obviously have been unconstitutional to have imposed any fee for that privilege" because doing so directly burdens interstate commerce. 299 U.S., at 62, 57 S.Ct., at 78. Section 2 changed all of that. The Court answered appellees' assertion that § 2 did not abrogate negative Commerce Clause restrictions. The contrast between this discussion and the Court's rule in *Bacchus* is stark:

> "[Appellees] request us to construe the Amendment as saying, in effect: The State may prohibit the importation of intoxicating liquors provided it prohibits the manufacture and sale within its borders; but if it permits such manufacture and sale, it must let imported liquors compete with the domestic on equal terms. To say that, would involve not a construction of the Amendment, but a rewriting of it.
>
> "The plaintiffs argue that, despite the Amendment, a State may not regulate importations except for the purpose of protecting the public health, safety or morals; and that the importer's license fee was not imposed to that end. Surely the State may adopt a lesser degree of regulation than total prohibition. Can it be doubted that a State might establish a state monopoly of the manufacture and sale of beer, and either prohibit all competing importations, or discourage importation by laying a heavy impost, or channelize desired importations by confining them to a single consignee?" *Id.*, at 62-63, 57 S.Ct., at 78-79.

Numerous cases following *Young's Market* are to the same effect, recognizing the States' broad authority to regulate commerce in intoxicating beverages unconstrained by negative Commerce Clause restrictions. See, *e.g., Ziffrin, Inc. v. Reeves*, 308 U.S. 132, 138, 60 S.Ct. 163, 166, 84 L.Ed. 128 (1939); *United States v. Frankfort Distilleries, Inc.*, 324 U.S. 293, 299, 65 S.Ct. 661, 664, 89 L.Ed. 951 (1945); *Seagram & Sons, Inc. v. Hostetter*, 384 U.S. 35, 42, 86 S.Ct. 1254, 1259, 16 L.Ed.2d 336 (1966); *Heublein, Inc. v. South Carolina Tax Comm'n*, 409 U.S. 275, 283-284, 93 S.Ct. 483, 488-489, 34 L.Ed.2d 472 (1972); see generally *Bacchus*,

supra, at 281-282, 104 S.Ct., at 3060-3061 (STEVENS, J., dissenting).

The cases that the *Bacchus* Court cited in support of its new rule in fact provided no notice whatsoever of the impending change. *Idlewild, Midcal,* and *Capital Cities, supra,* all involved States' authority to regulate the sale and importation of alcohol when doing so conflicted directly with legislation passed by Congress pursuant to its powers under the Commerce Clause. The Court in each case held that § 2 did not give States the authority to override congressional legislation. These essentially were Supremacy Clause cases; in that context, the Court concluded that the Twenty-first Amendment had not "repealed" the Commerce Clause. See *Idlewild, supra,* 377 U.S., at 331-332, 84 S.Ct., at 1297-1298; *Midcal, supra,* 445 U.S., at 108-109, 100 S.Ct., at 944-945; *Capital Cities, supra,* 467 U.S., at 712-713, 104 S.Ct., at 2707.

These cases are irrelevant to *Bacchus* because they involved the relation between § 2 and Congress' authority to legislate under the (positive) Commerce Clause. *Bacchus* and the *Young's Market* line concerned States' authority to regulate liquor unconstrained by the *negative* Commerce Clause in the absence of any congressional pronouncement. This distinction was clear from *Idlewild, Midcal,* and *Capital Cities* themselves. *Idlewild* and *Capital Cities* acknowledged explicitly that § 2 trumps the negative Commerce Clause. See *Idlewild, supra,* 377 U.S., at 330, 84 S.Ct., at 1296 (" 'Since the Twenty-first Amendment, . . . the right of a state to prohibit or regulate the importation of intoxicating liquor is not limited by the commerce clause. . . . ' "), quoting *Indianapolis Brewing Co. v. Liquor Control Comm'n,* 305 U.S. 391, 394, 59 S.Ct. 254,

255, 83 L.Ed. 243 (1939); *Capital Cities, supra,* 467 U.S., at 712, 104 S.Ct., at 2707 (" 'This Court's decisions . . . have confirmed that the [Twenty-first] Amendment primarily created an exception to the normal operation of the Commerce Clause.' . . . § 2 reserves to the States power to impose burdens on interstate commerce in intoxicating liquor that, absent the Amendment, would clearly be invalid under the Commerce Clause"), quoting *Craig v. Boren,* 429 U.S. 190, 206, 97 S.Ct. 451, 461, 50 L.Ed.2d 397 (1976).

In short, *Bacchus'* rule that the Commerce Clause places restrictions on state power under § 2 in the absence of any congressional action came out of the blue. *Bacchus* overruled the *Young's Market* line in this regard and created a new rule. See *Bacchus,* 468 U.S., at 278-287, 104 S.Ct., at 3059-3064 (STEVENS, J., dissenting) (explaining just how new the rule of that case was).

There is nothing in the nature of the *Bacchus* rule that dictates retroactive application. The negative Commerce Clause, which underlies that rule, prohibits States from interfering with interstate commerce. As to its application in *Bacchus,* that purpose is fully served if States are, from the date of that decision, prevented from enacting similar tax schemes. Petitioner James Beam argues that the purposes of the Commerce Clause will not be served fully unless *Bacchus* is applied retroactively. The company contends that retroactive application will further deter States from enacting such schemes. The argument fails. Before our decision in *Bacchus,* the State of Georgia was fully justified in believing that the tax at issue in this case did not violate the Commerce Clause. Indeed, before *Bacchus* it did not violate the Commerce Clause. The imposition of

liability in hindsight against a State that, acting reasonably would do the same thing again, will prevent no unconstitutionality. See *American Trucking*, 496 U.S., at ___, 110 S.Ct., at ___ (opinion of O'CONNOR, J.).

Precisely because *Bacchus* was so unprecedented, the equities weigh heavily against retroactive application of the rule announced in that case. "Where a State can easily foresee the invalidation of its tax statutes, its reliance interests may merit little concern. . . . By contrast, because the State cannot be expected to foresee that a decision of this Court would overturn established precedents, the inequity of unsettling actions taken in reliance on those precedents is apparent." *American Trucking, supra*, at ___, 110 S.Ct., at 2333 (opinion of O'CONNOR, J.). In this case, Georgia reasonably relied not only on the *Young's Market* line of cases from this Court, but a Georgia Supreme Court decision upholding the predecessor to the tax statute at issue. See *Scott v. Georgia*, 187 Ga. 702, 705, 2 S.E.2d 65, 66 (1939), relying on *Young's Market* and *Indianapolis Brewing*.

Nor is there much to weight in the balance. Before *Bacchus*, the legitimate expectation of James Beam and other liquor manufacturers was that they had to pay the tax here at issue and that it was constitutional. They made their business decisions accordingly. There is little hardship to these companies from not receiving a tax refund they had no reason to anticipate.

The equitable analysis of *Chevron Oil* places limitations on the liability that may be imposed on unsuspecting parties after this Court changes the law. James Beam claims that if *Bacchus* is applied retroactively, and the

Georgia excise tax is declared to have been collected unconstitutionally from 1982 to 1984, the State owes the company a $2.4 million refund. App. 8. There are at least two identical refund actions pending in the Georgia courts. These plaintiffs seek refunds of almost $28 million. See *Heublein, Inc. v. Georgia,* Civ. Action No. 87-3542-6 (DeKalb Super.Ct., Apr. 24, 1987); *Joseph E. Seagram & Sons, Inc. v. Georgia,* Civ. Action No. 87-7070-8 (DeKalb Super.Ct., Sept. 4, 1987). Brief for Respondents 26, n. 8. The State estimates its total potential liability to all those taxed at $30 million. *Id.,* at 30. To impose on Georgia and the other States that reasonably relied on this Court's established precedent such extraordinary retroactive liability, at a time when most States are struggling to fund even the most basic services, is the height of unfairness.

We are not concerned here with a State that reaped an unconstitutional windfall from its taxpayers. Georgia collected in good faith what was at the time a constitutional tax. The Court now subjects the State to potentially devastating liability without fair warning. This burden will fall not on some corrupt state government, but ultimately on the blamelesss and unexpecting citizens of Georgia in the form of higher taxes and reduced benefits. Nothing in our jurisprudence compels that result; our traditional analysis of retroactivity dictates against it.

A fair application of the *Chevron Oil* analysis requires that *Bacchus* not be applied retroactively. It should not have been applied even to the parties in that case. That mistake was made. The Court today compounds the problem by imposing widespread liability on parties having no reason to expect it. This decision is made in the

name of "equality" and "*stare decisis.*" By refusing to take into account the settled expectations of those who relied on this Court's established precedents, the Court's decision perverts the meaning of both those terms. I respectfully dissent.

APPENDIX E

259 Ga. 363, 382 S.E.2d 95

JAMES B. BEAM DISTILLING COMPANY

v.

STATE of Georgia et al.

STATE of Georgia

v.

JAMES B. BEAM DISTILLING COMPANY

Nos. 46642, 46681.

Supreme Court of Georgia.

July 14, 1989.

Reconsideration Denied July 26, 1989.

MARSHALL, Chief Justice.

James B. Beam Distilling Co. (Beam) brought this action seeking a $2,400,000 refund for excise taxes it paid in 1982, 1983 and 1984. The taxes were paid pursuant to O.C.G.A. § 3-4-60, which imposed a higher tax on alcoholic beverages imported into the state than on those manufactured in Georgia. The statute was amended in 1985, shortly after the United States Supreme Court found a similar statute to be unconstitutional. *See, Bacchus Imports, Ltd. v. Dias,* 468 U.S. 263, 104 S.Ct. 3049, 82 L.Ed.2d 200 (1984).[1] In the proceedings below, the trial court determined that the pre-1985 statute was unconstitutional because it violated the Commerce Clause of

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[1] The amended statute has been challenged and found to be constitutional. *See, Heublein, Inc. v. State,* 256 Ga. 578, 351 S.E.2d 190 (1987).

the U.S. Constitution. The court further held that the ruling would only be applied prospectively so that Beam is not entitled to a refund. We affirm.

1. The State appeals the trial court's decision that the pre-1985 version of O.C.G.A. § 3-4-60 was unconstitutional. We find no error. The statute imposed higher taxes on out-of-state products solely because of their origin. The record demonstrates that the purpose and effect of the statute was simple economic protectionism, which is virtually per se invalid under the Commerce Clause of the U.S. Constitution. *Id.*

2. Beam asserts that the trial court erred in applying the decision prospectively only. We disagree. In *Flewellen v. Atlanta Casualty Co.*, 250 Ga. 709, 300 S.E.2d 673 (1983), this Court adopted the three-pronged test set forth in *Chevron Oil v. Huson*, 404 U.S. 97, 92 S.Ct. 349, 30 L.Ed.2d 296 (1971), to be applied in deciding a retroactivity question:

> (1) Consider whether the decision to be applied nonretroactively established a new principle of law, either by overruling past precedent on which litigants relied, or by deciding an issue of first impression whose resolution was not clearly foreshadowed.
>
> (2) Balance of the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation would further or retard its operation.
>
> (3) Weigh the inequity imposed by retroactive application, for, if a decision could produce

> substantial inequitable results if applied retroactively, there is ample basis for avoiding the injustice or hardship by a holding of nonretroactivity.

Flewellen, 250 Ga. at 712, 300 S.E.2d 673. Retroactive application of a judicial decision is not compelled constitutionally or otherwise[2] where unjust results would accrue to those who justifiably relied on the prior rule. *Strickland v. Newton County*, 244 Ga. 54, 258 S.E.2d 132 (1979) (decision holding local option sales tax should be applied prospectively to avoid unjust results).

Applying the first prong of the *Chevron* test, we note that the decision does not now establish a "new rule." However, if the decision had been rendered during 1984, the last year that the tax was assessed, it would certainly have overruled past precedent. The tax structure embodied in O.C.G.A. § 3-5-60 had been in effect in Georgia since 1938. In 1939 the statute was challenged on the grounds that it violated the Commerce Clause of the U.S. Constitution and was upheld. *Scott v. State*, 187 Ga. 702, 2 S.E.2d 65 (1939), overruled on other grounds, *Blackston v. Georgia Department of Natural Resources*, 255 Ga. 15, 334 S.E.2d 679 (1985). After the *Scott* decision, the import tax

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[2] We are not persuaded by Beam's argument that O.C.G.A. § 48-2-35(a) mandates retroactive application of the constitutional decision. The statute provides, "A taxpayer shall be refunded any and all taxes or fees which are determined to have been erroneously or illegally assessed and collected from him . . . " The statute does not describe how it should be determined that a tax was "illegally assessed." It simply does not address the issue of retroactive versus prospective application of a constitutional decision.

was not challenged again until 1985. *See Heublein*, supra. During the time that the taxes at issue here were collected, the State had no reason to believe that the import taxes were unconstitutional. Moreover, when it became clear that there might be constitutional problems with the statute, *see Bacchus*, supra, the legislature moved promptly to amend the statute to rectify the defects. Thus, it appears that the first prong of the *Chevron* test favors prospective application of the rule.

The second prong of the *Chevron* test has no application here because the statute at issue was repealed in 1985. We move therefore to the third prong of the test, which involves balancing the equities. Beam seeks 2.4 million dollars that it paid in 1982, 1983 and 1984. There are at least two other lawsuits currently pending in which other alcohol producers seek over 28 million dollars in tax refunds on the same grounds. Economic realities lead to the inescapable conclusion that the cost of this tax has or could have been already absorbed by the companies and passed on to Georgia consumers. Indeed, retroactive application of the ruling might well result in a windfall to the alcohol producers.

On the other hand, if the decision is applied retroactively, Georgia faces liability for over 30 million dollars in refunds for taxes it collected in good faith under an unchallenged and presumptively valid statute. Georgia would have to refund large sums of money that it has already spent. Prospective application would avoid imposing a severe financial burden on the state and its citizens. In such situations, this Court and the courts of other states have frequently declined retroactive application, even though the ruling allows an unconstitutional

statute to remain in effect for a limited period of time. *See, Federated Mutual Ins. Co. v. DeKalb County*, 255 Ga. 522, 341 S.E.2d 3 (1986); *American Trucking Association v. Gray*, 295 Ark. 43, 746 S.W.2d 377 (1988) (out-of-state truckers were not entitled to refund of taxes found violative of the Commerce Clause); *National Distributing Co. v. Office of the Comptroller*, 523 So.2d 156 (Fla.1988) (prospective ruling appropriate where equities weighed against refund of taxes paid under alcoholic beverage statute); *Metropolitan Life Ins. Co. v. Commissioner of Dept. of Insurance*, 373 N.W.2d 399 (N.D.1985) (no refund of taxes paid under statute giving unconstitutional preference to domestic insurance companies).

3. In 1939, this court upheld the precursor to the pre-1985 version of O.C.G.A. § 3-4-60 against a Commerce Clause challenge. *Scott v. State*, 187 Ga. 702, 2 S.E.2d 65 (1939), *overruled on other grounds, Blackston v. Georgia Dep't of Natural Resources*, 255 Ga. 15, 334 S.E.2d 679 (1985). Now, some fifty years later, we are striking down its successor because it violates the Commerce Clause.

As the dissent points out, there are a number of cases strongly supporting the argument that because the statute was unconstitutional, it was void ab initio. *See, e.g., Denison Mfg. Co. v. Wright*, 156 Ga. 789, 120 S.E. 120 (1923); *Battle v. Shivers*, 39 Ga. 405 (1869).

However, the rule of voidness ab initio is not an absolute rule. It has exceptions.

> "The general rule is that an unconstitutional statute is wholly void and of no force and effect from the date it was enacted. This harsh rule is subject to exceptions, however, where, because

> of the nature of the statute and its previous application, unjust results would accrue to those who justifiably relied on it. . . . " While we have declared statutes to be void from their inception when they were contrary to the Constitution at the time of enactment, . . . those decisions are not applicable to the present controversy, as the original . . . statute, when adopted, was not violative of the Constitution under court interpretations of that period.

Adams v. Adams, 249 Ga. 477, 478-79, 291 S.E.2d 518 (1982) (citations omitted) (quoting *Strickland v. Newton County*, 244 Ga. 54, 55, 258 S.E.2d 132 (1979) (citations omitted)). Other cases have held similarly. *E.g., Strickland v. Newton County*, 244 Ga. 54, 55, 258 S.E.2d 132 (1979); *Allan v. Allan*, 236 Ga. 199, 207-08, 223 S.E.2d 445 (1976). In all of these cases, the court has applied its decision prospectively rather than retroactively.

We apply the exception to the general rule. Here, the state has collected taxes under this statute or its predecessors over a half century in reliance on a decision of this court. Under these circumstances and the balancing factors discussed in division two, *supra*, we hold it would be unjust to declare the statute void ab initio.

In sum, we conclude that prospective application of the decision is appropriate. The decision of the trial court is affirmed in all respects.

Judgment affirmed.

All the Justices concur, except SMITH and WELTNER, JJ., who dissent as to Divisions 2 and 3.

SMITH, Justice, concurring in part and dissenting in part.

The problem with this case is that it is too simple. All that is involved is a statute which has been declared unconstitutional, a constitutional provision which requires this Court to declare the unconstitutional statute *void*, and a statute which says taxes erroneously or illegally collected must be refunded. This case involves the state's illegal collection of taxes from a single, readily-identifiable party on the basis of an unconstitutional statute. The majority has successfully avoided the clear mandate of the Georgia Constitution, Georgia case law, and the Georgia refund statute. The "complicated exceptions" which the majority pointed out only make the simplicity of this case more pronounced. In short, the majority opinion is an excellent example of the judiciary attacking the solid rock of established Georgia constitutional law and Georgia case law with a hoe and trying to convince everyone that it's a bulldozer.

TAXPAYER'S RIGHTS

By placing emphasis on the issue of whether the decision in *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 104 S.Ct. 3049, 82 L.Ed.2d 200 (1984)[1] should be given a

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[1] The Court in *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 277, 104 S.Ct. 3049, 3058, 82 L.Ed.2d 200 (1984), declined to address the refund issue. It remanded the case to the Supreme Court of Hawaii to determine the refund issues "which are essentially issues of remedy for the imposition of a tax that unconstitutionally discriminated against interstate commerce . . . " 468 U.S. at 277, 104 S.Ct. at 3058. The Court did note,

retroactive application, the majority disguises the real issue: Which is more important in Georgia – the state's right to protect the ill-gotten gains of the treasury or the taxpayer's right to relief after a clear violation of the taxpayer's constitutional rights? See Tatarowicz, *Right to a Refund for Unconstitutionally Discriminatory State Taxes and Other Controversial State Tax Issues Under the Commerce Clause*, 41 Tax Lawyer (Fall 1987).

The majority opinion concludes that the state's right to protect its treasury is more important; however, I believe that the right of the taxpayer is more important.[2] The majority found, and I agree, that "the purpose and effect of the statute was simple economic protectionism, which is virtually per se invalid under the Commerce Clause of the U.S. Constitution."

Thus, I concur in the part of the majority opinion that affirms the trial court's holding that the pre-amendment statute was unconstitutional; however, there are several separate and distinct statutory and constitutional issues involved in this case that clearly distinguish it from the

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"It may be, for example, that given an unconstitutional discrimination, a full refund is mandated by state law." Note 14. Here the statute unconstitutionally discriminated against non-resident taxpayers and a full refund is mandated by state law.

[2] As we celebrate this Fourth of July, we are reminded that one of the sparks which ignited the Revolutionary War was the abusive manner in which the colonists were being taxed by the King. Our forefathers fought and won independence from a King who extracted excessive taxes, and the Constitution was drafted to protect the people from such abuses.

cases that have been cited by the majority.[3] Therefore, I strongly disagree with the majority's conclusion "that prospective application of the decision is appropriate."

DISCUSSION OF THE MAJORITY OPINION

1. This Court adopted the test for retroactive application of judicial decisions set forth in *Chevron Oil v. Huson*, 404 U.S. 97, 92 S.Ct. 349, 30 L.Ed.2d 296 (1971) in *Flewellen v. Atlanta Casualty Co.*, 250 Ga. 709, 300 S.E.2d 673 (1983), but *Flewellen* did not declare a statute unconstitutional.[4]

The majority also states in division two: "Retroactive application of a judicial decision is not compelled constitutionally or otherwise where unjust results would accrue to those who justifiably relied on the prior rule." As set out in Div. 3, infra, of this dissent, there is no question of "retroactive application of a judicial decision" when a statute is declared unconstitutional in Georgia. Once a

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[3] Only one Georgia case was cited by the majority in division two which allegedly supports its conclusion that "an unconstitutional statute [may] remain in effect for a limited period of time." This case, *Federated Mutual Ins. Co. v. DeKalb County*, 255 Ga. 522, 341 S.E.2d 3 (1986), dealt with a repeal of a statute or ordinance by implication. The constitutionality of the statute was not involved. The other cases cited were foreign,and the majority did not show that those states have constitutional provisions similar to Georgia's. Under our constitution a statute is either constitutional and valid or unconstitutional and *void*. The constitution does not mandate a holding of "partial voidness."

[4] The only issue in *Flewellen* involved the proper interpretation and application of state insurance statutes.

statute is declared unconstitutional it becomes the *constitutional duty* of the judiciary to declare the statute *void*.

2. The majority would have us believe an earlier unsuccessful constitutional challenge in *Scott v. State*, 187 Ga. 702, 2 S.Ed.2d 65 (1939), somehow negates the constitutional mandate requiring this Court to declare the unconstitutional statute *void*. There is nothing in the Georgia Constitution indicating that reliance upon earlier decisions of this Court in any way changes or modifies the mandate of the constitution to declare unconstitutional statutes *void*.

THE GEORGIA CONSTITUTIONAL MANDATE

3. Our Constitution *requires* us to declare unconstitutional legislative acts *void*. Ga. Constitution 1983, Art. I, Sec. II, Par. V.[5] That constitutional provision does not allow this Court to set a specific date upon which an unconstitutional statute becomes inoperative. It does not allow this Court to determine that a statute is just a little bit void. It does not allow this Court to ignore its clear mandate or the long line of Georgia cases that have upheld the constitutional mandate. Nor can this Court rely on United States Supreme Court decisions that are not on point and in which the Georgia Constitution was never discussed or considered. (See Div. 5, infra, discussion of *Chicot County Drainage Dist. v. Baxter State Bank*, 308 U.S. 371, 60 S.Ct. 317, 84 L.Ed. 329 (1940).) Instead our

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[5] Paragraph V of the 1983 Georgia Constitution entitled "What acts void" states: "Legislative acts in violation of this Constitution or the Constitution of the United States are void, and the judiciary shall so declare them."

constitution and case law require us to declare unconstitutional acts entirely *void* from their inception.

> An unconstitutional statute, though having the form, features, and name of law, is in reality no law. It is wholly void. In legal contemplation it is as inoperative as if it had never been passed. It has been declared that it is a misnomer to call such statute a law. Such a statute confers no authority upon any one, and affords protection to no one. *Norton v. Shelby County,* 118 U.S. 425 (6 Sup.Ct. 1121, 30 L.ed. 178); *Ex Parte Siebold,* 100 U. S. 371, 376 (25 L. ed. 717); [Cits.]; *McCants v. Layfield,* 149 *Ga.* [231] 238, (99 S. E. 877).
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> In *Osborn v. Bank of the United States,* 9 Wheat. 738 (6 L. ed. 204), Chief Justice Marshall declared that "it is an extravagant proposition that a void act can afford protection to the person who executes it." In *Boston v. Cummins,* 16 *Ga.* 102, 106 (60 Am. D. 717), this court declared that "The unconstitutional acts of the legislature, State and Federal, *are not laws;* and *no court will execute them, having a proper sense of its own obligations and responsibilities.*" In *Welborn v. Estes,* 70 *Ga.* 390 this court said: "Legislative acts in violation of the constitution of this State or of the United States are void." The constitution of this State declares that "Legislative acts in violation of this constitution or the constitution of the United States are void, and the judiciary shall so declare them." Proceedings under an unconstitutional statute had before such statute is judicially declared to be unconstitutional are void. *Jordan v. Franklin,* 131 *Ga.* 487 (52 [62] S. E. 673); *Worth County v. Crisp County,* 139 *Ga.* 117 (3) (76 S.E. 747); *James v. Blakely,* 143 Ga. 117 (84 S. E. 431). (Emphasis supplied in part.)

Dennison Mfg. Co. v. Wright, 156 Ga. 789, 797, 120 S.E. 120 (1923). See also *State Highway Department v. H.G. Hastings Co.*, 187 Ga. 204, 215, 199 S.E.2d 793 (1938); *Tarpley v. Carr*, 204 Ga. 721, 727, 51 S.E.2d 638 (1949) (City officers were not *de facto* officers of office created under an unconstitutional charter); *Franklin v. Harper*, 205 Ga. 779, 784, 55 S.E.2d 221 (1949); *Baggett v. Linder*, 208 Ga. 590, 591, 68 S.E.2d 469 (1952); *Milam v. Adams*, 216 Ga. 440, 444, 117 S.E.2d 343 (1960); *K. Gordon Murray Productions, Inc. v. Floyd*, 217 Ga. 784, 787, 125 S.E.2d 207 (1962) (" . . . the remedy provided in the ordinance is not even law if the petitioner's constitutional attack is sustained.") *Dobson v. Brown*, 225 Ga. 73, 76, 166 S.E.2d 22 (1969) (" 'Not even estoppel can legalize or vitalize that which the law declares unlawful and void.' "); and *Mapp v. First Georgia Bank, et al.*, 156 Ga.App. 380, 274 S.E.2d 765 (1980). (See note 7, infra.)[6]

Although *Bacchus* may have led this Court to conclude that the Georgia statute, in the present case was unconstitutional, it does not affect Art. I, Sec. II, Par. V of the Georgia Constitution which provides that an unconstitutional statute is void from its inception. Once the statute was declared unconstitutional, it was as if no statute, case law, or public policy had ever been established. "The Constitution is irrepealable, and any law in violation of it is void – is null; rights *cannot* grow up under such a law." *Battle v. Shivers*, 39 Ga. 405, 417 (1869). Once the statute was declared unconstitutional it became inoperative, as if it had never been passed. Therefore, no

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[6] The law in this area has been so firmly established that few recent cases discuss the issue.

court having a proper sense of its own obligations and responsibilities will execute it. *Dennison,* supra, 156 Ga. at 797, 120 S.E. at 120. The state had no authority to assess or collect the taxes, and this Court has no authority to execute a void statute.

THERE ARE NO EQUITIES TO BALANCE

4. The majority's discussion of "balancing the equities," is misplaced. When a statute is declared unconstitutional, there can be no balancing of equities as none exist. "[W]e are bound to follow the laws of this state and the decisions of our Supreme Court even when . . . the resulting decision effects a hardship. . . . " *Mapp v. First Georgia Bank, et al.,* 156 Ga.App. 380, 381, 274 S.E.2d 765 (1980).[7]

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[7] On May 26, 1976 appellant Mapp purchased an automobile from Ed Cook. The car had been purchased by Cook from Hopkins Chevrolet, Inc., which in turn had purchased the automobile from Timmers Chevrolet, Inc., pursuant to a sale under the Georgia Abandoned Motor Vehicle Act. On October 26, 1976, First Georgia Bank repossessed the automobile, claiming that it held a perfected security interest in the automobile which had been created at the time of the initial purchase by C.J. Wilson. Mapp filed suit against the Bank, alleging that the Bank had illegally converted the automobile. The trial court granted summary judgment in favor of the Bank, concluding that Mapp's title was invalid on the basis of a 1979 case which held the Georgia Abandoned Motor Vehicle Act to be unconstitutional. Since the sale was in accordance with an act which was later held to be unconstitutional, the sale passed no title. The Court of Appeals affirmed the trial court's ruling because an unconstitutional statute is a void statute from its inception and no rights accrue thereunder.

COURT CREATED "EXCEPTIONS" TO THE GEORGIA CONSTITUTION

5. A careful reading of the three cases cited by the majority for the "exceptions" to the constitutional mandate reveals a fundamental weakness. The first case to deviate from the constitutional mandate and the feeble foundation relied upon in the other two cited cases is *Allan v. Allan*, 236 Ga. 199, 223 S.E.2d 445 (1976). The Court in *Allan* without any discussion of the Georgia Constitution or the long line of Georgia cases that have declared that an unconstitutional statute is *void*, relied instead upon dicta set forth by the United States Supreme Court in *Chicot County Drainage District v. Baxter State Bank*, 308 U.S. 371, 374, 60 S.Ct. 317, 318, 84 L.Ed. 329 (1939). However, immediately preceding the *Chicot* dicta that the majority relied upon, the following appeared:

> [An] Act of Congress, having been found to be unconstitutional, [is] not a law; that it [is] inoperative, conferring no rights and imposing no duties. . . . *Norton v. Shelby County* 118 U. S. 425, 442 [6 S.Ct. 1121, 1125, 30 L.Ed. 178]; *Chicago, I & L. Ry Co. v. Hackett*, 228 U. S. 559, 566] 33 S.Ct. 581, 584, 57 L.Ed. 966].

Chicot at 374, 60 S.Ct. at 318.

An even more astonishing discovery in reading *Chicot* is that *Chicot* cited *Norton v. Shelby County*, the exact same case cited in *Dennison*, supra, (see Div. 3 of this dissent), for the proposition that an unconstitutional statute "confers no authority upon any one, and affords protection to no one." See division 3 of this dissent. The *Allan* opinion ignored the above language with its two

citations to Supreme Court decisions and quoted dicta that was completely devoid of a citation to any decision of any court.[8]

Reliance on unsupported *Chicot* dicta in *Allan* or in any other case is totally without foundation and substance. The cases that follow *Chicot* and *Allan* represent abberations that should be overruled because they conflict with the Georgia Constitution and Georgia cases. See also *Strickland et al. v. Newton County, et al* [sic], 244 Ga. 54, 258 S.E.2d 132 (1979) and *Adams v. Adams*, 249 Ga. 477, 479, 291 S.E.2d 518 (1982) which use *Allan* and *Chicot* as their authority.

THE EXTRAORDINARY FACTS OF THE THREE CASES

6. Assuming *arguendo* that the cases are not abberations but do in fact represent "exceptions," then they offer the strongest arguments for declaring this case is not such an "exception." Each of the "exception cases" contained unusual and extraordinary conditions that are not present in this case. By applying the alleged "exceptions" to the general rule, the majority has made the "exceptions" the rule.

In the three cases that represent the "exceptions," the Court in attempting to do equity, did not face the constitutional mandate head-on.

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[8] The language relied upon by *Allan* was totally unnecessary in adjudicating the *Chicot* case. The respondents in *Chicot* failed to raise a constitutional issue in the courts below; therefore, the case was "appropriately confine[d] . . . to the question of *res judicata*. . . . " 308 U.S. at 375, 60 S.Ct. at 319.

In *Allan, Strickland,* and *Adams,* there may have been other individuals who may have been harmed in the past, but they were, for all practical purposes, unascertainable. The amount of damage suffered by other individuals was also almost impossible to determine. In *Allan* and *Adams* there was also the potential of disrupting years of quiet titles and confusing property law.

This case, on the other hand, involves one clearly-identified taxpayer who paid the state an ascertainable amount of money in illegal taxes over a specified period of time; therefore, there is no difficulty in determining to whom the taxes should be refunded and for what amount. In addition, such a refund would not disturb property law.

The "exceptions" are built upon a faulty unconstitutional foundation, and they should fall. They are court-made, but not constitutionally allowed.

THE CONSTITUTION IS THE WILL OF THE PEOPLE

7. The supreme power of this state is in the people and the written constitution is the will of the people. The people have decided that the judiciary must declare unconstitutional statutes *void.* By looking to dicta of United States Supreme Court decisions – in which our constitution was not at issue – this Court ignores the dictate of the people as set forth in the Georgia Constitution.

THE REMEDY STATUTE REPRESENTS THE PUBLIC POLICY OF THE STATE

8. By employing sweeping language in the remedy statute, OCGA § 48-2-35, the General Assembly made clear that *any and all* taxes which are erroneously or illegally assessed and collected shall be refunded.[9] If the court denies a refund to a taxpayer who has successfully challenged the constitutionality of a taxing statute, then the Court has assumed that the remedy statute has no meaning. This is contrary to established law. "The courts of this state will not assume that the Legislature intended any provision of a statute to be without meaning." *Douglas County v. Annewakee, Inc.*, 179 Ga.App. 270, 273, 346 S.E.2d 368 (1986).

The remedy statute represents the state's public policy to refund any and all taxes erroneously or illegally assessed and collected under state law. The statute includes taxes which are paid voluntarily and involuntarily, thus no element of duress is required nor must a protest be filed. The remedy statute is mandatory rather than directory, and it acts as a waiver of sovereign immunity. *Thompson v. Continental Gin Co.*, 73 Ga.App. 694, 37 S.E.2d 819 (1946).

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[9] OCGA § 48-2-35 is entitled "Refunds." Subsection (a) provides: "A taxpayer *shall be refunded* any and all taxes or fees which are determined to have been erroneously or illegally assessed and collected from him under the laws of this state, whether paid voluntarily or involuntarily, and shall be refunded interest on the amount of the taxes or fees at the rate of 9 percent per annum from the date of payment of the tax or fee to the commissioner. . . . " (Emphasis supplied.)

Since the General Assembly intended to allow refunds under many different circumstances, it is incomprehensible that the taxpayer in the present case who successfully challenged the constitutionality of the taxing statute is barred from recovery. The key words of the remedy statute are *erroneously or illegally assessed and collected.* The majority indicates that the state had "no reason to believe that the import taxes were unconstitutional"; however, under the broad language of the statute it makes no difference that the state *erroneously* assessed and collected taxes under the unconstitutional statute. Erroneously assessed and collected taxes must be returned. Once the taxing statute was declared unconstitutional and *void,* there was no legal collection of these taxes, nor had there ever been one. Therefore, the state is illegally in possession of the taxpayer's property.

OTHER CONSTITUTIONAL PROVISIONS WHICH REQUIRE REPAYMENT

9. There are also constitutional provisions which require the return of unconstitutionally assessed and collected taxes. The state cannot deprive a person of property without due process of law. Georgia Constitution 1983, Art. I, Sec. I, Par I. The due-process clause extends to every proceeding which may be a deprivation of "life, liberty, or property, whether the process be judicial or administrative or executive in its nature. [Cit.]" *Zachos v. Huiet,* 195 Ga. 780, 786, 25 S.E.2d 806 (1943). The assessment and collection of taxes in the absence of a valid taxing statute constitutes such an unconstitutional deprivation of property.

10. One of the paramount duties of government is to protect the property of its taxpayers. Georgia Constitution 1983, Art. I, Sec. I, Par. II. "It is the duty of the State government, through the instrumentality of the courts, to protect the property of a citizen and his right to possess and control it." *Irwin v. Willis*, 202 Ga. 463, 477, 43 S.E.2d 691 (1947). This Court must protect taxpayers who have had property erroneously or illegally taken under the auspices of an unconstitutional taxing statute by requiring the state to refund such illegally-collected taxes.[10]

The above constitutional provisions, all found in our Bill of Rights, were enacted to place limits on the government and to protect the people from governmental abuses. The government's authority to tax is powerful. In fact, in 1819 Chief Justice Marshall said:

> [That] the power to tax involves the power to destroy. . . . [is a] proposition[] not to be denied.

McCulloch v. Maryland, 17 U.S. (4 Wheaton) 316, 431, 4 L.Ed. 579 (1819).

If this Court does not treat the unconstitutional statute as *void* from its inception, then nothing will deter the state from enacting other unconstitutional statutes and

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[10] An identical question is involved in *Marcus Collins v. Waldron and all Retired Federal Employees Similarly situated*, No. 47018 argued June 27, 1989. Retired federal employees challenged Georgia's scheme of taxation which taxes the retirement income of federal retirees while exempting the retirement income of state retirees as being unconstitutional. They argued, under the authority of *Davis v. Michigan Department of Treasury*, ___ U.S. ___, 109 S.Ct. 1500, 103 L.Ed.2d 891 (1989), that the Georgia scheme is unconstitutional and, therefore, the taxes were illegally collected.

reaping the benefits therefrom. The constitutional mandate to declare the statute void, Ga. Constitution, 1983, Art. I, Sec. II, Par. V, is the taxpayer's protection from the power of the sovereign "to destroy." *McCulloch*, id.

This Court has placed a great deal of emphasis on the fact that the taxpayer in this case is a liquor company. It does not matter who the taxpayer is – a liquor company or an illegally taxed individual – the taxpayer is entitled to protection under the laws of this state. As former Supreme Court Justice Hugo Black said:

> Good men and bad men are entitled to trial and sentence in accordance with the law.

CONCLUSION

The constitutional mandate requiring this Court to declare the statute *void* has been ignored. The state's expressed public policy to refund taxes is thwarted just as the remedy statute, OCGA § 48-2-35, is trampled and, in reality, repealed by this Court. The majority's insistence upon declaring the statute *void* prospectively only,[11] while ignoring the Georgia Constitution, grants a hollow victory to the appellant who proved the taxing statute was unconstitutional. It also denies a remedy for the unlawful taking of the appellant's property, disregards

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[11] How can something be applied prospectively if it never existed? The doctrine of nonretroactivity may be used when dealing with a valid statute, law, case law, or a change in law or public policy. It does not apply and is not used in Georgia constitutional cases because the statute, case law, or public policy must, as required by our constitution and case law, be treated as if it never existed.

the mandatory nature of the remedy statute, and sends the message to Georgia taxpayers that this Court will not protect their rights nor require the state to be accountable for taxes unconstitutionally and erroneously or illegally assessed and collected.

APPENDIX F

IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

JAMES B. BEAM DISTILLING CO., a Delaware Corporation, Plaintiff v. STATE OF GEORGIA, JOE FRANK HARRIS, Individually and as Governor of the State of Georgia, MARCUS E. COLLINS, Individually and as Georgia State Revenue Commissioner, and CLAUDE L. VICKERS, individually and as Director of the Fiscal Division of the Department of Administrative Services, Defendants	§	CIVIL ACTION, FILE NO. D-42527 (Filed May 27, 1988)

FINAL ORDER

This action came on for hearing on Cross Motions for Summary Judgment filed by plaintiff and defendants. The questions presented for resolution by the Court are whether O.C.G.A. §3-4-60, as that statute existed and was applied in 1982, 1983 and 1984 (prior to its amendment in 1985) violated the Commerce Clause and the Equal Protection Clause of the United States Constitution by discriminating against out-of-state producers of alcoholic

beverages in order to promote the manufacture of alcoholic beverages and the local production of the component materials of alcoholic beverages within Georgia.

UNDISPUTED FACTS

The Court observes that there is no genuine dispute with respect to the following material facts:

1.

James B. Beam Distilling Co. (hereinafter "James Beam") is a Delaware corporation.

2.

James Beam is a producer and importer of alcoholic beverages.

3.

James Beam is engaged in business in interstate commerce throughout the United States.

4.

James Beam is permitted by federal and Georgia authorities to import alcoholic beverages.

5.

James Beam ships and sells alcoholic beverages produced outside the State of Georgia to licensed wholesalers doing business in the State of Georgia.

6.

Defendant Joe Frank Harris is the Governor of Georgia.

7.

Joe Frank Harris is the State official who has authority, under O.C.G.A. §48-2-35(a), to authorize a refund of taxes.

8.

Defendant Marcus E. Collins is the Georgia State Revenue Commissioner (hereinafter "Commissioner") and is the State official who is charged with the duty to administer and enforce the State's revenue laws, including the taxes imposed under O.C.G.A. §3-4-60.

9.

Defendant Claude L. Vickers is the Director of the Fiscal Division of the Department of Administrative Services of the State of Georgia (hereinafter "Fiscal Division").

10.

The Commissioner is directed to remit to the Fiscal Division the taxes (and penalties, interest, and fees) collected under O.C.G.A. §3-4-60.

11.

The jurisdiction of this Court is predicated upon, and venue in this Court, is proper pursuant to, O.C.G.A. §48-2-35(4)(A).

12.

As a condition to selling alcoholic beverages to Georgia wholesalers, James Beam, during the time period relevant to this action, was required under O.C.G.A. §§3-4-60 and 3-4-61 to pay the applicable state excise

taxes by purchasing stamps in proper denominations denoting the payment of taxes and affixing such stamps to each bottle or container of alcoholic beverages.

13.

Pursuant to O.C.G.A. §48-2-35(a), a taxpayer shall be refunded any and all taxes which are determined to have been illegally assessed and collected from the taxpayer under the laws of the State of Georgia, whether paid voluntarily or involuntarily, and shall be refunded interest on the amount of the taxes at the rate of 9% per annum from the date of payment of the tax to the Commissioner.

14.

On or about April 25, 1985, James Beam made a claim for refund of taxes assessed and collected from James Beam during 1982 through 1984 under O.C.G.A. §3-4-60 (hereinafter "Refund Claim").

15.

The Refund Claim is in the form and contains such information as required pursuant to O.C.G.A. §48-2-35(b)(1).

16.

In the Refund Claim, James Beam requested a conference or hearing before the Commissioner in connection with the claim, but the Commissioner failed to grant a conference.

17.

The Refund Claim was not decided by the Commissioner or his delegate within one year from the date of filing the Refund Claim.

18.

Because the Refund Claim was not decided by the Commissioner or his delegate within one year from the date of filing, O.C.G.A. §48-2-35(4) gave James Beam the right to bring an action for refund in this Court.

19.

Pursuant to O.C.G.A. §48-2-35(5), this action is timely commenced.

20.

Under O.C.G.A. §3-4-60, as codified during the time period relevant to this action, locally produced distilled spirits area taxed at 50 cents per liter.

21.

Under O.C.G.A. §3-4-60, as codified during the time period relevant to this action, locally produced alcohol is taxed at 70 cents per liter.

22.

Under O.C.G.A. §3-4-60, as codified during the time period relevant to this action, distilled spirits manufactured outside Georgia are taxed at $1.00 per liter.

23.

Under O.C.G.A. §3-4-60, as codified during the time period relevant to this action, alcohol manufactured outside Georgia is taxed at $1.40 per liter.

24.

All alcoholic beverages covered by O.C.G.A. §3-4-60, as codified during the time period relevant to this action, are taxed proportionately at the applicable rate on all fractional parts of a liter.

25.

No legislative history or other evidence is contained in the record to support the State's contention that O.C.G.A §3-4-60 was originally enacted with a disparity to cover the added cost of regulating this imported product.

26.

O.C.G.A. §3-4-60 was enacted to encourage Georgia residents to grow products used to produce alcohol and distilled spirits.

CONCLUSIONS OF LAW

1.

O.C.G.A. §3-4-60 was enacted exclusively for the benefit of Georgia grown products and Georgia manufacturers of alcohol.

2.

The disparity in taxation in O.C.G.A. §3-4-60 was unrelated to the costs of regulation and enforcement.

3.

Bacchus Imports, Ltd. v. Dias, 468 U.S. 263, 270 (1984) provides that if either the purpose or effect of a state tax is to discriminate in favor of local businesses or goods, then the legislation may constitute "simple economic protectionism" and, if so, is virtually *per se* invalid. This Court holds that, as a matter of law, the effect of O.C.G.A. §3-4-60 is discriminatory against alcoholic beverages produced outside the state of Georgia in that said beverages are taxed at twice the rate of beverages produced in Georgia from Georgia-grown products. The Twenty First Amendment to the United States Constitution permits the State to discriminate under certain now more clearly defined circumstances where interstate commerce of alcohol is involved.

4.

"[O]nce a state law is shown to discriminate against interstate commerce 'either on its face or in practical effect' the burden falls on the State to demonstrate both that the statute 'serves a legitimate local purpose,' and that this purpose could not be served as well by available non-discriminatory means." *Main v. Taylor*, ___ U.S. ___, 106 S. Ct. 2440, 2448 (1986). This Court holds that, in view of the facially discriminatory effect of the statute as it existed during the years in question, the burden to show a legitimate local purpose has fallen to the State. The defendants in this action have not met their burden to show a correlation between the higher tax on out-of-state alcoholic beverages and the contended additional costs involved in regulating such beverages, which the defendants claim to be the justification for the disparity.

5.

This Court further holds that the purpose of O.C.G.A. §3-4-60, as it existed during the years in question, was economic protectionism, i.e., to benefit local business and local industry. This purpose is indicated by the legislative history, 1937-38 Ga. Laws Ex. Sess. 115, 117 (alcohol and distilled spirits). *See also* 1937 Ga. Laws 851, 853-54 & 1935 Ga. Laws 492 (the original purpose of the discrimination against "foreign wines" was "to foster and encourage the growing of grapes, fruits and berries on Georgia farms" and "to exempt from all taxation wines made . . . by producers in Georgia of such crops". The protectionist purpose of the statute is further indicated by the exhibits "A-3" through "A-13" produced by the plaintiff in opposition to the defendants' Motion for Summary Judgment and produced to plaintiff by the defendants pursuant to this Court's Order of December 3, 1987). "Examination of the State's purpose in this case is sufficient to demonstrate the State's lack of entitlement to a more flexible approach permitting an inquiry into the balance between local benefits and the burden on interstate commerce. *See Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970)." *Bacchus*, 468 U.S. at 270.

6.

The decision of the Georgia Supreme Court in *Heublein, Inc. v. Georgia*, 256 Ga. 578, 351 S.E.2d 190 (1987) is not dispositive of this case for the reason that the application of the Twenty First Amendment to the United States Constitution to the statute there under attack saved the State in light of record substantiating the necessity for a higher tax on distilled spirits produced outside Georgia.

Such is not the case here. That case involved O.C.G.A. §3-4-60 as amended in 1985 to alter the preferential taxing scheme by applying an add-on tax on the importation of alcoholic beverages manufactured outside the State of Georgia and the amount of the add-on tax was justified by the present additional expense necessary to regulate this industry. Here, the record before this Court concerning a statute in effect for 30 years, is silent as to any such need existing at the time of its enactment. Viewing the statute attacked here in light of *Bacchus* one clearly discerns that the original purpose of the 1938 Act was economic protectionism and the Commerce Clause has been violated notwithstanding the authority granted the States under the Twenty First Amendment. The State has shown, via *Heublein*, that there is a reasonable difference in the costs of administering control over imported and domestic alcoholic beverages. However, the State may not bootstrap its argument contending that this evidence somehow supplies a non violative purpose for the 1938 Act.

7.

The contention that the statute in question violates the Equal Protection Clause of the Constitution is meritless. Like *Heublein* this case involves " 'purely economic matters that traditionally merit only the mildest review under the Fourteenth Amendment.' " *Heublein Inc. v. State of Georgia*, 256 Ga. 578, 585 (1987) (quoting *Craig v. Boren*, 429 U.S. 190, 207 (1976)). The stated purpose of the 1938 Act for "legalizing and controlling" the importation of alcoholic beverages supports a finding that the import tax is rationally related to a legitimate state objective of regulating the importation of alcohol pursuant to the Twenty

First Amendment when tested by the requirements solely of equal protection. The disparity in taxes is inconsequential in an equal protection context.

8.

This Court holds that the statute in question, as it existed during the years of 1982, 1983 and 1984 was an unconstitutional infringement upon interstate commerce in violation of the Commerce Clause of the United States Constitution. However, this decision is to be applied prospectively, resulting in no refund to the plaintiff of the taxes paid pursuant to that statute for the above years. Georgia has adopted the test of *Chevron Oil Co. v. Huston*, 404 U.S. 97, 106-107 (1971) in determining whether a ruling should apply retroactively. *Federated Mutual Insurance Co. v. DeKalb County*, 176 Ga. App. 70, 72 (1985). These factors require that the Court (1) "must establish a new principle of law, either by overruling clear past precident [sic] on which litigants may have relied . . . or by deciding an issue of first impression whose resolution was not clearly foreshadowed . . . " *Chevron*, 404 U.S. at 106 (citations omitted); (2) " 'weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation.' " *Id.* at 106-07 (quoting *Linkletter v. Walker*, 381 U.S. 618 (1965)); (3) weighing the inequity imposed by application to determine whether the decision could "produce substantial inequitable results". *Id.* at 107 (citations omitted).

9.

First, in the present action, the decision of this Court establishes a new principle of law by overruling a past statute on which defendants relied. *See Strickland v. Newton County*, 244 Ga. 54, 55 (1979); *Ashland Oil Inc. v. Rose*, 350 S.E.2d 531, 535 (W. Va. 1986). Second, it is unnecessary to address the retrospective operation of the decision of this Court by applying a "weighing of the merits" test since the offending statute was amended in 1985 to remove its Constitutional infirmaties and no effort will be made hereafter to assert its validity by defendants. Lastly, the Court declines to apply this decision retroactively since it finds that here, as in a prior Georgia Supreme Court decision, "unjust results would accrue to those who justifiably relied on it." *Strickland v. Newton County*, 244 Ga. 54, 55 (1979); *Preston Carroll Co. v. Morrison Co.*, 173 Ga. App. 412, 414, *rev'd on other grounds*, 254 Ga. 608 (1985).

ORDER

Based on the foregoing Findings and Conclusions, it is hereby ORDERED and ADJUDGED as follows:

1.

The Court having considered the entire record including all exhibits submitted hereby GRANTS the Motion for Summary Judgment filed by plaintiff James B. Beam Distilling Company to the extent that it seeks to declare unconstitutional O.C.G.A. §3-4-60 and the Motion for Summary Judgment filed by defendants is accordingly DENIED.

2.

The Court having found that the test required by *Chevron Oil Co. v. Huston* has been met, hereby DIRECTS that this decision as it affects the imposition of taxes shall be applied prospectively. The Court hereby DIRECTS that the date of prospective application of this decision shall be the date of the enactment of the amendment to O.C.G.A. §3-4-60 and shall apply only to tax liability of plaintiff, if any, as of the date the statute was enacted in its present form. Having concluded that this decision should not be applied retroactively so as to allow plaintiff to recover a refund under O.C.G.A. §42-2-35(b)(1), and that this decision shall apply prospectively, plaintiff shall recover nothing. Further, the Court finds there is no just reason for delay and DIRECTS that Judgment be entered.

So ORDERED this 27th day of May, 1988.

/s/ Ralph H. Hicks
RALPH H. HICKS, JUDGE
Fulton Superior Court
Atlanta Judicial Circuit

APPENDIX G

CONSTITUTION OF THE UNITED STATES

ARTICLE VI [Supremacy Clause].

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

APPENDIX H

CONSTITUTION OF THE UNITED STATES

Article I, Section 8, clause 3 [Commerce Clause].

The Congress shall have Power To * * * regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.

APPENDIX I

CONSTITUTION OF THE UNITED STATES

Amendment XIV, § 1 [Due Process Clause].

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

APPENDIX J

CONSTITUTION OF THE UNITED STATES

Amendment XIV, § 1 [Equal Protection Clause].

No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.

APPENDIX K

In the Supreme Court of Georgia

Decided: DEC 2 1993

S92A0621. REICH V. COLLINS, et al.
S92A0622. REICH V. COLLINS, et al.

CLARKE, Chief Justice.

In *Reich v. Collins*, 262 Ga. 625 (422 SE2d 846) (1992) (*Reich v. Collins* I), we were faced with the issue of whether appellant Reich was entitled to a refund of state income taxes paid on his federal military retirement benefits in view of the decision of the United States Supreme Court in *Davis v. Michigan*, 489 U.S. 803 (109 SC 1500, 103 LE2d 891) (1989). The latter case held that a state taxing scheme which exempts state retirement benefits from state income taxation but does not so exempt federal retirement benefits violates the United States Constitution.[1] The initial issue to be determined in *Reich v. Collins* I was whether *Davis v. Michigan* should be applied retrospectively to Reich's claim. We held that, under recent decisions of the United States Supreme Court, retrospective application was required, but ultimately concluded that state law barred Reich's claim to a refund under OCGA 48-2-35 (a).

The U.S. Supreme Court subsequently granted Reich's petition for certiorari. That Court vacated the

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[1] Former OCGA 48-7-27 created a state income taxing scheme, a portion of which was unconstitutional under the authority of *Davis v. Michigan*. After the U.S. Supreme Court decided *Davis*, the Georgia legislature repealed the unconstitutional provisions of the code section.

judgment in *Reich v. Collins* I, and remanded the case to us "for further consideration in light of *Harper v. Virginia Department of Taxation,*" 509 U.S. ___ (113 SC 2510, 509 LE2d ___) (1993).

In *Harper,* the United States Supreme Court reversed a decision of the Virginia Supreme Court which held that the appellants in that case were not entitled to refunds of state income taxes because *Davis v. Michigan* should be applied prospectively only. The U.S. Supreme Court initially determined that *Davis v. Michigan* applies retrospectively. It then remanded *Harper* to the Virginia Supreme Court to follow the Constitutional mandate of providing relief "consistent with federal due process principles." *Harper,* 113 SC at 2519.

Due process requires that a state provide procedural safeguards against the unlawful exactions of taxes, *McKesson Corp. v. Division of Alcoholic Veberages* [sic] *& Tobacco,* 496 U.S. 18 (110 SC 2238, 2250, 100 LE2d 148) (1990), but the state retains some flexibility in the type safeguards it must provide. *Harper,* supra, 113 SC at 2519; *James B. Beam Distilling Co. v. The State of Georgia,* S93A1217, (Decided December ___, 1993). In remanding *Harper,* the United States Supreme Court held that

> If Virginia 'offers a meaningful opportunity for taxpayers to withold [sic] contested tax assessments and to challenge their validity in a predeprivation hearing,' the 'availability of a predeprivation hearing constitutes a procedural safeguard . . . sufficient by itself to satisfy the Due Process Clause.' [citing *McKesson Corp v. Division of Alcoholic Beverages & Tobacco,* 496 U.S. 18, 38, n. 21]. . . . On the other hand, if no such

> predeprivation remedy exists, 'the Due Process Clause of the Fourteenth Amendment obligates the State to provide meaningful backward-looking relief to rectify any unconstitutional deprivation.' 113 SC at 2519.[2]

In the first division of *Reich v. Collins* I, we held, consistent with *Harper v. Virginia*, that *Davis v. Michigan* must be applied retrospectively. Because the U.S. Supreme Court has vacated our judgment in that case, we expressly incorporate Division One of *Reich v. Collins* I into this opinion. We therefore conclude that our duty on remand is to determine whether Georgia law provided a predeprivation remedy to Reich sufficient to satisfy the requirements of federal due process as set out in *Harper* and *McKesson*, supra. While the selection of a remedy to be afforded is an issue of state law, *James B. Beam Distilling Co. v. Georgia*, 501 U.S. ___ (111 SC 2439, 115 LE2d 481, 488) (1991), this remedy must satisfy "minimum federal requirements." *Harper*, supra, 113 SC at 2520.

We have recently held in *James B. Beam Distilling Co. v. The State of Georgia*, S93A1217, supra, that the declaratory judgment remedies under OCGA 9-4-1 et seq., as well as statutory injunctive relief remedies available provide meaningful opportunities to taxpayers to litigate the validity of taxes alleged owing prior to the time when the

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[2] In *McKesson* the Court suggested that "meaningful, backward-looking relief" could include a refund, *Id.* at 2251, or the assessment and collection of back taxes from those who received favored treatment in violation of the Constitution, *Id.* at 2252.

taxes fall due.[3] As such, these remedies are of themselves sufficient to satisfy federal due process requirements.[4]

Additionally, there are predeprivation remedies under the Georgia Administrative Procedure Act of which a taxpayer may avail himself when making a constitutional challenge to a state tax. Under OCGA 50-13-12, a taxpayer who is aggrieved by "any act" of the Department of Revenue "in a matter involving. . . . liability for taxes," is entitled to a hearing before the Department. OCGA 50-13-19 and OCGA 5-13-20 provide for judicial review to a taxpayer dissatisfied with a decision by the Department of Revenue in a case brought under OCGA 50-13-12.

Further, pursuant to OCGA 48-2-59, a taxpayer may appeal an assessment by the Department of Revenue directly to the superior court, without the necessity of an administrative hearing.

We conclude that there are ample predeprivation remedies under Georgia law available to a taxpayer who seeks to challenge an allegedly unconstitutional tax. These remedies satisfy the requirements of federal due

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[3] In *McKesson*, supra, 110 SC at 2250, the Court held that "[t]he State may choose to provide a form of 'predeprivation process,' for example by authorizing taxpayers to bring suit to enjoin imposition of a tax prior to its payment . . . "

[4] Reich maintains that these are not viable remedies because his lawsuit seeking a declaratory judgment that the tax at issue in this case was unconstitutional was dismissed by the superior court. However, Reich did not appeal that decision.

process as set forth in *McKesson* and *Harper*, supra. Consequently, Reich's due process rights have not been violated by the Department's failure to refund to him that portion of income taxes paid in violation of *Davis v. Michigan*.

Judgment affirmed in part and reversed in part. All the Justices concur except Sears-Collins and Carley, JJ., who dissent.

S93A0621, S93A0622. REICH v. COLLINS et al.

CARLEY, Justice, dissenting.

Former OCGA § 48-7-27 provided that state retirement benefits were exempt from income taxation by the State, but that federal retirement benefits were not. However, the unconstitutionality of this former provision was established by the holding in *Davis v. Michigan*, 489 U.S. 803 (109 SC 1500, 103 LE2d 891) (1989). The mandate of *Davis* is to be applied retroactively, rather than prospectively. *Harper v. Va. Dept. of Taxation*, 509 U.S. ___ (113 SC 2510, 125 LE2d 74) (1993). Appellant is a Georgia taxpayer who seeks a refund of income taxes that he previously paid to the State pursuant to the unconstitutional provisions of former OCGA § 48-7-27. There is no question of appellant's standing to seek such a refund. Compare *James B. Beam Distilling Co. v. State of Ga.*, ___ Ga. ___ (Case Number S93A1217, decided December ___, 1993). However, the majority nevertheless holds that appellant

is not entitled to seek a refund because federal due process has otherwise been satisfied. In my opinion, appellant is entitled to the refund that he seeks and I must, therefore, dissent.

Where, as here, a taxpayer seeks a refund of state taxes that he has paid pursuant to a statute which is in contravention of the federal constitution, "[s]tate law may provide relief beyond the demands of federal due process, [cit.], but under no circumstances may it confine [the taxpayer] to a lesser remedy, [cit.]." *Harper v. Va. Dept. of Taxation*, supra at ___ (III). The minimum parameters of federal due process are clear. If a State has offered " 'a meaningful opportunity for taxpayers to withhold contested tax assessments and to challenge their validity in a predeprivation hearing,' the 'availability of a predeprivation hearing constitutes a procedural safeguard . . . sufficient by itself to satisfy the Due Process Clause.' [Cit.] On the other hand, if no such predeprivation remedy exists, 'the Due Process Clause of the Fourteenth Amendment obligates the State to provide meaningful backward-looking relief to rectify any unconstitutional deprivation.' [Cit.] In providing such relief, a State may either award full refunds to those burdened by the unlawful tax or issue some other order that 'create(s) in hindsight a nondiscriminatory scheme.' [Cit.]" *Harper v. Va. Dept. of Taxation*, supra at ___ (III). In responding to the unconstitutionality of former OCGA § 48-7-27, Georgia did not create "in hindsight a nondiscriminatory scheme" by assessing and collecting back income taxes from those taxpayers whose state retirement benefits had previously been exempted from taxation. See *McKesson v. Div. of Alcoholic Beverages and Tobacco*, 496 U.S. 18, 40 (III)

(B) (110 SC 2238, 100 LE2d 148) (1990). Georgia merely repealed the unconstitutional provisions of that former statute. Accordingly, appellant is constitutionally entitled to a refund unless he had available to him at the time that he paid the taxes a meaningful opportunity to withhold their payment and to challenge their validity in a predeprivation hearing. "[I]f a State chooses not to secure payments under duress and instead offers a meaningful opportunity for taxpayers to withhold contested tax assessments and to challenge their validity in a predeprivation hearing, payments tendered may be deemed 'voluntary.' . . . '(W)here voluntary payment (of a tax) is knowingly made pursuant to an illegal demand, recovery of that payment may be denied.' " *McKesson v. Div. of Alcoholic Beverages and Tobacco*, supra at 38 (III) (B), fn. 21. The issue for resolution is, therefore, whether appellant paid the unconstitutional taxes "voluntarily" or under "duress."

In my opinion, nothing under the specific provisions of the state tax code can be said to have provided appellant with the opportunity for a constitutionally meaningful predeprivation challenge to his payment of taxes pursuant to the unconstitutional provisions of former OCGA § 48-7-27. The majority cites OCGA § 48-2-59 as affording appellant such an opportunity. Subsection (a) of that statute does provide generally for an "appeal from any order, ruling, or finding of the commissioner to the superior court. . . . " However, subsection (c) further provides that, in order to secure review by the superior court, the taxpayer must file a surety bond or other security "conditioned to pay any tax over and above that for which the taxpayer has admitted liability and which is

found to be due by a final judgment of the court, together with interest and costs." By conditioning the taxpayer's right to appeal upon the posting of "a surety bond or other security," OCGA § 48-2-59 does not, in my opinion, satisfy " ' "the root requirement" of the Due Process Clause . . . "that an individual be given an opportunity for a hearing *before* he is deprived of any significant property interest," ' [cit.]. . . . " (Emphasis in original.) *McKesson v. Div. of Alcoholic Beverages and Tobacco*, supra at 37 (III) (B). To the contrary, that statute is merely one of the "various sanctions and summary remedies [contained in the tax code which are] designed so that [taxpayers] tender tax payments *before* their obligations are entertained and resolved." (Emphasis in original.) *McKesson v. Div. of Alcoholic Beverages and Tobacco*, supra at 38 (III) (B).

Thus, I cannot agree with the majority that OCGA § 48-2-59 satisfies minimum federal due process requirements such that appellant's failure to have resorted thereto renders his payment of the unconstitutional state income taxes "voluntary" and nonrefundable. "A State that 'establish(es) various sanctions and summary remedies designed' to prompt taxpayers to 'tender . . . payments *before* their objections are entertained or resolved' does not provide taxpayers 'a meaningful opportunity to withhold payment and to obtain a predeprivation determination of the tax assessment's validity.' [Cit.] Such limitations impose constitutionally significant ' "duress" ' because a tax payment rendered under these circumstances must be treated as an effort 'to avoid financial sanctions or a seizure of real or personal property.' [Cit.] The State accordingly may not confine a taxpayer

under duress to prospective relief." (Emphasis in original.) *Harper v. Va. Dept. of Taxation*, supra at ___ (III), fn. 10.

The majority also finds that the Administrative Procedure Act (APA) afforded appellant a constitutionally meaningful predeprivation remedy for contesting his payment of the unconstitutional taxes. Subsection (a) of OCGA § 50-13-12 does provide that the "Department of Revenue shall hold a hearing upon written demand therefor by any taxpayer aggrieved by any act of the department in a matter involving his liability for taxes. . . . " However, appellant was not "aggrieved by any act of the department," but an allegedly unconstitutional act of the legislature. Even assuming that the department would have had initial jurisdiction under the APA to entertain a challenge to the constitutionality of former OCGA § 48-7-27, such a challenge would be "futile at the time of its making." *Flint River Mills v. Henry*, 234 Ga. 385, 386 (216 SE2d 895) (1975). Thus, to secure a ruling on the constitutionality of former OCGA § 48-7-27 pursuant to the APA, appellant would presumably have been required to undergo an entirely "futile" hearing before the department and then incur the additional expenditure of time and money pursuing an appeal to the superior court. The availability of such an attenuated process cannot, in my opinion, be deemed to have provided appellant "with all of the [predeprivation] process [he] is due: an opportunity to contest the validity of the tax and a 'clear and certain remedy' designed to render the opportunity meaningful by preventing any . . . [pre]deprivation of property." *McKesson v. Div. of Alcoholic Beverages and Tobacco*, supra at 40 (III) (B).

Moreover, nothing in OCGA § 50-13-12 authorizes the taxpayer to withhold his taxes pending resolution of his purported administrative remedy and compels the department to forego the various sanctions and summary remedies that it is otherwise authorized to employ against the taxpayer under the tax code. Subsection (c) of that statute merely provides that, pending the hearing and decision, the department "*may* suspend or postpone the effective date of its previous action." (Emphasis supplied.) Thus, "[a] taxpayer who chooses [the administrative] remedy . . . is subject to the discretion of the commissioner and/or reviewing court as to whether collection procedures will be stayed ([cit.])." *Gainsville-Hall County Economic Opportunity Org., Inc. v. Blackman*, 233 Ga. 507, 508 (I) (212 SE2d 341) (1975). Since the administrative remedy relied upon by the majority does not clearly protect the taxpayer against the department's employment of its various sanctions and summary remedies designed to encourage timely payment *prior* to resolution of the dispute, I cannot agree with the majority's conclusion that that remedy satisfies the minimum requirements of federal due process. "We have long held that, when a tax is paid in order to avoid financial sanctions or a seizure of real or personal property, the tax is paid under 'duress' in the sense that the State has not provided a fair and meaningful predeprivation procedure. [Cits.]" *McKesson v. Div. of Alcoholic Beverages and Tobacco*, supra at 38 (III) (B), fn. 21.

The majority also relies upon the Declaratory Judgment Act as affording appellant a constitutionally meaningful predeprivation remedy. However, there is considerable doubt whether any *general* remedial statute,

such as a declaratory judgment act, can ever be considered to be an available "clear and certain remedy" such that a taxpayer's failure to have invoked those provisions can be deemed to evidence his "voluntary" payment of unconstitutional taxes. As I understand the mandate of the controlling decisions of the Supreme Court of the United States, the determination of the availability of a taxpayer's "clear and certain" predeprivation remedy should be confined to a consideration of the *specific* tax structure enacted by the State, and not be based upon the existence of *general* remedies which, with the benefit of hindsight, can be urged to have otherwise been available to the taxpayer. See *Harper v. Va. Dept. of Taxation*, supra, and *McKesson v. Div. of Alcoholic Beverages and Tobacco*, supra, neither of which discuss the availability of general, rather than specific, taxpayer relief. Confining our inquiry to the specific statutes, such as OCGA §§ 48-2-59 and 50-13-12, which do relate to the resolution of tax disputes, it is clear to me that Georgia has established "various sanctions and summary remedies designed so that [taxpayers] tender tax payments *before* their objections are entertained and resolved. As a result, [Georgia] does not purport to provide taxpayers like [appellant] with a meaningful opportunity to withhold payment and to obtain a predeprivation determination of the tax assessment's validity. . . . " (Emphasis in original.) *McKesson v. Div. of Alcoholic Beverages and Tobacco*, supra at 38 (III) (B).

In any event, I cannot agree with the majority's conclusion that the Georgia Declaratory Judgment Act can be considered to be such a "clear and certain remedy" that

appellant's failure to have invoked its provisions evidences his "voluntary" payment of the unconstitutional taxes. As is true in the case of the administrative remedy, there is nothing in our Declaratory Judgment Act which authorizes the taxpayer to withhold his taxes pending resolution of his claim or which compels the department to forego employment of the various sanctions and summary remedies that it is otherwise authorized to pursue under the tax code. The trial court is authorized to grant the taxpayer injunctive relief, but the exercise of that authority is discretionary and a taxpayer cannot, therefore, be assured that the department's collection procedures will be stayed. Since the declaratory judgment remedy advanced by the majority does not clearly protect the taxpayer against the department's employment of its various sanctions and summary remedies which are otherwise designed to encourage timely payment of taxes *prior* to resolution of the dispute, I cannot agree with the majority's conclusion that that remedy satisfies the minimum requirements of federal due process.

For all the reasons stated, I believe that appellant's payment of the unconstitutional taxes was not made "volluntarily," but was made under "duress." I believe, therefore, that the majority opinion erroneously "confine[s] [appellant] to a lesser remedy" than that which federal due process demands. *Harper v. Va. Dept. of Taxation*, supra at ___ (III). Accordingly, I must respectfully dissent to the majority's failure to afford appellant the "meaningful backward-looking relief" of the refund to which he is constitutionally entitled. *Harper v. Va. Dept. of Taxation*, supra at ___ (III).

I am authorized to state that Justice Sears-Collins joins in this dissent.

APPENDIX L

262 Ga. 625, 422 SE. 2d 846

REICH

v.

COLLINS, et al.

REICH

v.

COLLINS, et al.

Nos. S92A0621, S92A0622.

Supreme Court of Georgia.

Nov. 19, 1992.

Reconsideration Denied Dec. 17, 1992.

CLARKE, Chief Justice.

We granted the appellant's application to appeal, OCGA § 5-6-35(a), to consider the issue of his entitlement to a refund of state income taxes paid on his federal military retirement benefits in view of the United States Supreme Court's decision in *Davis v. Michigan*, 489 U.S. 803, 109 S.Ct. 1500, 103 L.Ed.2d 891 (1989).

Former OCGA § 48-7-27 created an income tax exemption for retirement benefits paid by the State of Georgia to retired state employees. No such exemption existed for retirement benefits paid by the federal government to retired federal employees residing in Georgia. In *Davis v. Michigan*, supra, the United States Supreme Court held that Michigan's taxing scheme, which exempted from state income taxation all state retirement benefits, but taxed all federal retirement benefits, violated the

constitutional principles of intergovernmental tax immunity, as well as 4 U.S.C. § 111.[1] Because the State of Michigan conceded that a refund would be due the taxpayer if the Court found its taxing scheme to be unconstitutional, it was not necessary for the Court to determine the merits of the taxpayer's claim for a refund. The case was remanded to the Michigan courts to comply with the Court's "mandate of equal treatment," *Davis*, 489 U.S. at 818, 109 S.Ct. at 1509, in determining whether the taxpayer was entitled to prospective relief from discriminatory taxation.

Following the decision in *Davis v. Michigan*, the Georgia legislature, in special session, repealed that portion of OCGA § 48-7-27 which granted retired state employees an exemption from income taxation on their retirement benefits. Shortly thereafter, appellant, a retired colonel in the United States Army, filed a claim with the appellee Department of Revenue for a refund of income taxes he had paid to the State of Georgia on his military retirement benefits. The Department denied his claim, and appellant brought this action pursuant to OCGA § 48-2-35.

The case came before the trial court, on cross-motions for summary judgment. The trial court concluded that former OCGA § 48-7-27 violated the principles of *Davis v. Michigan*, supra, and partially granted the appellant's motion for summary judgment on this issue. However, after analyzing the case under *Chevron Oil v. Huson*, 404

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[1] This Code section permits the states to tax "pay or compensation for personal services as [a federal] officer or employee. . . . if the taxation does not discriminate against the employee because of the source of the pay or compensation."

U.S. 97, 92 S.Ct. 349, 30 L.Ed.2d 296 (1971), the trial court held that *Davis v. Michigan* should not be applied retrospectively. The trial court therefore concluded that the appellant was not entitled to a refund, and granted the appellee's motion for summary judgment in this regard.

The appellant concedes that if this court determines that he is entitled to a refund, he will be eligible only for the taxable years 1985 through 1988.

1. We agree with the trial court that the principles of *Davis v. Michigan* apply to this case.[2] However, we have determined that, with regard to the issue of retroactive application, the case must be analyzed under *James B. Beam v. Georgia*, 501 U.S. ___, 111 S.Ct. 2439, 115 L.Ed.2d 481 (1991), rather than the test set out in *Chevron Oil*, supra.

In *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 104, S.Ct. 3049, 82 L.Ed.2d 200 (1984), the U.S. Supreme Court held that Hawaii's taxing scheme, which distinguished between imported and locally distilled alcohol products, violated the Commerce Clause. Following this decision, James B. Beam Distilling Company filed a suit for refund of taxes it had paid to the State of Georgia, claiming entitlement to the refund under *Bacchus*. In *James B. Beam v. State of Georgia*, 259 Ga. 363, 382 S.E.2d 95 (1989), this court recognized that Georgia's taxing scheme, which imposed a higher tax on alcoholic beverages imported into the state than on alcohol produced in this state, violated the principles of *Bacchus*, supra. However,

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[2] We note that the State did not appeal this ruling by the trial court.

analyzing the case under *Chevron Oil*, supra, we held that the trial court did not err in applying the *Bacchus* decision prospectively only. The U.S. Supreme Court granted certiorari to our decision in *Beam* and reversed, holding that *Bacchus* should have been applied retroactively to our decision in *Beam*.

The U.S. Supreme Court held that where, in a civil case such as *Bacchus*, it does not reserve the question of whether the holding should be applied retroactively, the decision "is properly understood to have followed the normal rule of retroactive application in a civil case," ___ U.S. at ___, 111 S.Ct. at 2445, 115 L.Ed.2d at 490, and thus the decision is to be applied not only to the parties before it, but "to all others by and against whom claims may be pressed, consistent with res judicata and procedural barriers such as statutes of limitation." *Id.* ___ U.S. at ___, 111 S.Ct. at 2443, 115 L.Ed.2d at 488. The Court held that it is error for a lower court to refuse to apply a rule of federal law retroactively after the case announcing it has already done so. *Id.* ___ U.S. at ___, 111 S.Ct. at 2446, 115 L.Ed.2d at 491. The Court went on to distinguish between the issue of retroactivity where a federal law or constitutional question is raised, and the issue of remedies, "i.e., whether the party prevailing under a new rule should obtain the same relief that would have been awarded if the rule had been an old one." *Id.* ___ U.S. at ___, 111 S.Ct. at 2443, 115 L.Ed.2d at 487. In the normal circumstance, the issue of retrospectivity, or choice of law, is a federal question, while the remedial inquiry is left to the states. *Id.* ___ U.S. at ___, 111 S.Ct. at 2443, 115 L.Ed.2d at 488. The Court stated, as a general guideline, that when it remands a case to a lower court for consideration of any

remedial issues, this "necessarily implies" that the choice of law, or retroactivity, question has been decided, and that the Court will apply its decision not only to the parties before it, but retrospectively to all others not procedurally barred. *Id.* ___ U.S. at ___, 111 S.Ct. at 2445-46, 115 L.Ed.2d at 490-491.[3]

The State's argument in the case before us is that because it cannot be determined from the Court's opinion in *Davis v. Michigan* that the case was remanded for consideration of remedial issues since Michigan had conceded that a refund was due the taxpayer, it cannot be concluded that the Supreme Court intended retroactive application of the *Davis* decision. We do not agree.

As we read *Davis v. Michigan*, the Court applied its decision to the taxpayer before it. The state of Michigan conceded that if the Court found its taxing scheme to be unconstitutional, then, under state law, the taxpayer would be entitled to a refund. Once the Supreme Court determined that Michigan's taxing scheme was unconstitutional and applied that principle to the taxpayer, Michigan conceded that the taxpayer was entitled to a refund. It does not follow that if the Supreme Court had determined that its decision in *Davis* was to be

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[3] The Court held in *Beam* that principles of "equality and stare decisis" prevail over the *Chevron Oil* analysis, *Beam*, ___ U.S. at ___, 111 S.Ct. at 2446, 115 L.Ed.2d at 491, and that the need to ensure that the substantive law "will not shift and spring," *Id.* ___ U.S. at ___, 111 S.Ct. at 2447, 115 L.Ed.2d at 493, limits the "possible applications of *Chevron Oil.*" *Id.*

prospective only,[4] and thus not applicable to the litigants before it, that the State of Michigan would have conceded the taxpayer was due a refund.

Further, the issue of whether *Davis v. Michigan* is to be applied retroactively is foreclosed by the Supreme Court's decision in *Barker v. Kansas*, ___ U.S. ___, 112 S.Ct. 1619, 118 L.Ed.2d 243 (1992). In that case military retirees challenged the Kansas income taxation scheme which permitted taxation of federal retirement benefits while exempting from taxation state retirement benefits. The U.S. Supreme Court held that this case was controlled by *Davis v. Michigan*. The Court reversed and remanded to the lower court for a determination of the remaining issues, including the taxpayers' entitlement to refunds of taxes previously paid. As such, it is clear that the Court applied the decision of *Davis v. Michigan* retroactively to the litigants in *Barker*, just as the Court applied the *Bacchus* decision retroactively to the litigants in *James Beam*.[5]

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[4] See *Beam*, ___ U.S. at ___, 111 S.Ct. at 2443, 115 L.Ed.2d at 488 for a discussion of prospective application of court decisions. Under the Court's analysis the prospective method of overruling cases does not apply to the new rule to the parties in the case, but only uses the case as a vehicle for announcing a new rule of law. The principle of selective prospectivity, in which the new rule is applied to the litigants before the court, has been abandoned in the criminal context, see *Griffith v. Kentucky*, 479 U.S. 314, 107 S.Ct. 708, 93 L.Ed.2d 649 (1987), and "appears never to have been endorsed [by the Court] in the civil context." *Beam*, ___ U.S. at ___, 111 S.Ct. at ___, 115 Ed.2d at 490.

[5] We further note that the Virginia Supreme Court analyzed an identical tax issue under the principles of *Chevron Oil*, and determined that *Davis v. Michigan* is not to be applied retroactively. *Harper v. Virginia Dept. of Taxation*, 241 Va. 232, 401 S.E.2d

We thus conclude that the trial court correctly held that OCGA § 48-7-27 violated the principles of *Davis v. Michigan*, but erred in holding that this case does not apply retroactively.

2. The issue of what remedy is to be afforded the appellant remains. This is a question of state law. *Beam*, supra, ___ U.S. at ___, 111 S.Ct. at 2443, 115 L.Ed.2d at 488. As the Supreme Court stated in *Beam*, nothing deprives the State of its "opportunity to raise procedural bars to recovery under state law or demonstrate reliance interests entitled to consideration in determining the nature of the remedy that must be provided. . . ." *Beam*, ___ U.S. at ___, 111 S.Ct. at 2448, 115 L.Ed.2d at 494.

OCGA § 48-2-35(a) provides, in part, that "[a] taxpayer shall be refunded any and all taxes or fees which are determined to have been erroneously or illegally assessed and collected from him *under the laws of this state*, whether paid voluntarily or involuntarily . . ." (Emphasis supplied.) We hold that this statute contemplates the situation where a taxing authority erroneously or illegally assesses and collects a tax under a valid law. It does not address the situation where the law under which the taxes are assessed and collected is itself subsequently

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868 (1991). The U.S. Supreme Court granted certiorari as to this decision, vacated the judgment of the Virginia Supreme Court, and remanded for consideration in light of its decision in *James Beam*. ___ U.S. ___,111 S.Ct. 2883, 115 L.Ed.2d 1049 (1991). On remand the Virginia Supreme Court concluded that *James Beam* does not require retroactive application of *Davis v. Michigan*, 242 Va. 322, 410 S.E.2d 629 (1991). On May 18, 1992, the U.S. Supreme court granted certiorari to that decision. ___ U.S. ___, 112 S.Ct. 1934, 118 L.Ed.2d 541.

declared to be unconstitutional or otherwise invalid. This distinction is significant in that the State must be able to rely on the laws under which it assesses taxes in order to promote stable and efficient government. Furthermore, this protects the State against those instances in which a vendor/taxpayer has recouped its tax expense by passing it on to the consumer. See, *e.g., Atlanta Americana Motor Hotel Corp. v. Undercofler,* 222 Ga 295(1), 149 S.E.2d 691 (1966); *Blackmon v. Premium Oil Stations, Inc.,* 129 Ga.App. 169, 198 S.E.2d 900 (1973); *Blackmon v. Ga. Independent Oilmen's Ass'n,* 129 Ga.App. 171, 198 S.E.2d 896 (1973). Were we to interpret the statute differently, the vendor/taxpayer would realize a windfall or double recovery not intended by the legislature.

Thus we conclude that the taxpayer is not entitled to a refund under the provisions of OCGA § 48-2-35(a).

We take this opportunity to hold that in cases in which a taxing statute is declared unconstitutional or otherwise void, a taxpayer must have made a demand for refund at the time the tax is paid or at the time his tax return is filed, whichever occurs last. Failure to do so bars any future claim.

Judgment affirmed in part and reversed in part.

HUNT, BENHAM and FLETCHER, J.J., concur.

SEARS-COLLINS, J., concurs in the judgment only.

BELL, P.J., disqualified.

APPENDIX M

IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

JAMES B. BEAM DISTILLING CO., a Delaware corporation, Plaintiff, v. STATE OF GEORGIA, JOE FRANK HARRIS, individually and as Governor of the State of Georgia, MARCUS E. COLLINS, individually and as Georgia State Revenue Commissioner, and CLAUDE L. VICKERS, individually and as Director of the Fiscal Division of the Department of Administrative Services, Defendants.	CIVIL ACTION FILE NO. B-42527 B16-264 (Filed April 17, 1987)

COMPLAINT FOR REFUND OF TAXES
ILLEGALLY ASSESSED AND COLLECTED

The Plaintiff, by its attorneys, for its Complaint for refund of taxes illegally assessed and collected, alleges as follows:

PARTIES

1.

The Plaintiff, James B. Beam Distilling Co. (hereinafter "James Beam"), a Delaware corporation, is a producer and importer of alcoholic beverages and is engaged in business in interstate commerce throughout the United

States. James Beam is permitted by federal and State authorities to import alcoholic beverages. James Beam ships and sells alcoholic beverages produced outside the State of Georgia to licensed wholesalers doing business in the State of Georgia.

2.

Defendants are the State of Georgia and the State officials responsible for implementing, collecting, and administering the taxes that this refund action concerns.

3.

Defendant Joe Frank Harris is the Governor of Georgia and is responsible for enforcing its law. He is the State official who has authority, under Official Code of Ga. Ann. § 48-2-35(a), to authorize a refund of taxes.

4.

Defendant Marcus E. Collins is the Georgia State Revenue Commissioner (the "Commissioner") and is the State official who is charged with the duty to administer and enforce the State's revenue laws, including the taxes imposed under Official Code of Ga. Ann. § 3-4-60, which this refund action concerns.

5.

Defendant Claude L. Vickers is Director of the Fiscal Division of the Department of Administrative Services of the State of Georgia. The Commissioner is directed to

remit to the Fiscal Division the taxes (and penalties, interest, and fees) collected under Official Code of Ga. Ann. § 3-4-60.

6.

Because this action alleges Official Code of Ga. Ann. § 3-4-60 to be unconstitutional, the Attorney General of the State shall be served with a copy of this proceeding.

JURISDICTION AND VENUE

7.

The jurisdiction of this Court is predicated upon, and venue in this Court is proper pursuant to, Official Code of Ga. Ann. § 48-2-35(4)(A).

FACTUAL AND LEGAL BACKGROUND

8.

As a condition to selling alcoholic beverages to Georgia wholesalers, James Beam, during the time period relevant to this action, was required under Official Code of Ga. Ann. §§ 3-4-60 and 3-4-61 to pay the applicable State excise taxes by purchasing stamps in proper denominations denoting the payment of taxes and affixing such stamps to each bottle or container of alcoholic beverages.

9.

Official Code of Ga. Ann. § 3-4-60, as codified during the time period relevant to this action, on its face and as applied constitutes an unlawful burden on interstate

commerce in violation of the Commerce Clause, article I, section 8, clause 3 of the United States Constitution, because the State by its tax scheme favors domestic enterprises over businesses from other states.

10.

Official Code of Ga. Ann. § 3-4-60 discriminates against interstate commerce in violation of the Commerce Clause and the principle of *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984), because it has both the purpose and effect of discriminating in favor of local products by providing a direct commercial advantage to local enterprises, and is not supported by any clear concern of the Twenty-first Amendment to the United States Constitution.

11.

Official Code of Ga. Ann. § 3-4-60, as codified during the time period relevant to this action, imposes on alcoholic beverages not manufactured within Georgia a substantially greater tax than on domestic products. On its face, and as applied to James Beam, the statute discriminates in violation of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

12.

The arbitrary distinction in Official Code of Ga. Ann. § 3-4-60 between domestic and foreign products and enterprises is not rationally related to any legitimate State

purpose. The statute is completely discriminatory, favoring domestic enterprises by taxing foreign enterprises at substantially higher rates solely because of their residence, thus the statute violates the Equal Protection Clause and the principle of *Metropolitan Life Insurance Co. v. Ward*, 470 U.S. 869 (1985).

CLAIM FOR REFUND

13.

In 1982, James Beam paid taxes under Official Code of Ga. Ann. § 3-4-60 in the amount $649,000.00.

14.

In 1983, James Beam paid taxes under Official Code of Ga. Ann. § 3-4-60 in the amount $857,000.00.

15.

In 1984, James Beam paid taxes under Official Code of Ga. Ann. § 3-4-60 in the amount $894,000.00.

16.

Thus, from 1982 to 1984, James Beam paid taxes under Official Code of Ga. Ann. § 3-4-60 in the total amount $2,400,000.00, all of which were illegally assessed and collected from James Beam.

17.

Pursuant to Official Code of Ga. Ann. § 48-2-35(a), a taxpayer shall be refunded any and all taxes which are determined to have been illegally assessed and collected from the taxpayer under the laws of this State, whether paid voluntarily or involuntarily, and shall be refunded interest on the amount of the taxes at the rate of 9% per annum from the date of payment of the tax to the Commissioner.

18.

Pursuant to Official Code of Ga. Ann. § 48-2-35(b)(1), James Beam timely made a claim for refund of the taxes illegally assessed and collected from James Beam during 1982 through 1984 under Official Code of Ga. Ann. § 3-4-60. An accurate facsimile of James Beam's claim filed in writing on or about April 25, 1985, in the form and containing such information as required, is attached hereto as Exhibit "A."

19.

In its claim for refund, James Beam requested a conference or hearing before the Commissioner in connection with the claim, however the Commissioner failed to grant a conference as required.

20.

James Beam's claim for refund has not been decided by the Commissioner or his delegate within one year from the date of filing the claim, thus Official Code of Ga.

Ann. § 48-2-35(4) gives James Beam the right to bring this action for refund.

21.

Pursuant to Official Code of Ga. Ann. § 48-2-35(5), this action is timely commenced.

PRAYER FOR RELIEF

WHEREFORE, James Beam prays:

(1) that this Court grant a refund of $2,400,000.00 for the taxes illegally assessed and collected from James Beam during 1982 through 1984 under Official Code of Ga. Ann. § 3-4-60, with interest;

(2) that the Court direct Defendants to take any and all action necessary to draw a refund from the State Treasury to James Beam in the amount prayed;

(3) that the Court award James Beam its attorneys' fees and the costs of this action; and

(4) that the Court grant James Beam such other and further relief as the Court may deem just and proper.

Respectfully submitted,
/s/ John L. Taylor, Jr.
Attorney for Plaintiff
James B. Beam Distilling Co.

Morton Siegel
Michael A. Moses
Richard G. Schoenstadt
James L. Webster

SIEGEL, MOSES & SCHOENSTADT
10 East Huron Street
Chicago, Illinois 60611

John L. Taylor, Jr.
John L. Schaub

CHOREY, TAYLOR & FEIL
A Professional Corporation
500 Candler Building
127 Peachtree Street, N.E.
Atlanta, Georgia 30303

Attorneys for Plaintiff
James B. Beam Distilling Co.

EXHIBIT A

LAW OFFICES OF
SIEGEL, DENBERG, VANASCO,
SHUKOVSKY, MOSES & SCHOENSTADT
Avondale Centre • Suite 1700 • Twenty North Clark Street • Chicago, Illinois 60602 • (312) 641-5505 Telecopier (312) 372-4744

Kenneth H. Denberg
Michael A. Moses
Richard G. Schoenstadt
David J. Shukovsky
Morton Siegel
Robert A. Vanasco
James L. Webster

April 25, 1985

Mr. Ed Vaughn, Director
Alcohol and Tobacco Tax Unit
Georgia Department of Revenue
270 Washington Street, S.W.
Atlanta, GA 30334

re: James B. Beam Distilling Co./Application for Credit for Beverage Alcohol Taxes

Dear Director Vaughn:

Enclosed please find James B. Beam Distilling Co.'s application for claim for refund pursuant to § 48-2-35 (Ga. Code Ann.) for distilled spirits excise taxes erroneously and illegally assessed and collected from Beam under § 3-4-60(1) (Ga. Code Ann.). Said claim is made for the years 1982, 1983 and 1984.

The authority upon which Beam relies is set forth under Subpar. 4, entitled "Basis of Claim". I would appreciate your contacting the undersigned for purposes of setting up a conference relative to disposition of this claim. I will

be out-of-town the week of April 29 and will be back in the office on Monday, May 6.

Thank you for your attention to this matter.

Very truly yours,

Morton Siegel

MS:llc

[logo]

GEORGIA DEPARTMENT OF REVENUE
ALCOHOL AND TOBACCO TAX UNIT
319 TRINITY – WASHINGTON BUILDING
ATLANTA, GEORGIA 30334
Telephone Number: (404) 656-4263

APPLICATION FOR CREDIT FOR
BEVERAGE ALCOHOL TAXES

PART I – To be filled in by claimant
James B. Beam Distilling Co.

1. NAME AND ADDRESS OF CLAIMANT
500 North Michigan Avenue
ADDRESS CITY STATE ZIP CODE
Chicago, Illinois 60601

2. KIND OF TAX CREDIT CLAIMED
DISTILLED SPIRITS [X] MALT BEVERAGE [ ] WINE [ ]
Excise Tax §3-4-60(1)

3. AMOUNT OF TAX CREDIT CLAIMED

$649,000.00 – 1982	$ 894,000.00 – 1984
$857,000.00 – 1983	$2,400,000.00 – TOTAL

4. BASIS OF CLAIM (Give the detailed information for which the claim is filed and other facts which will tell the State Revenue Commissioner the exact basis for the claim. Please identify any documents or statements submitted in support of this claim.)

James B. Beam Distilling Co.'s claim for refund is pursuant to § 48-2-35 (Ga. Code Ann.) for the reason that § 3-4-60 (Ga. Code Ann.) has imposed an excise tax on distilled spirits which is unconstitutional, because it violates the Commerce Clause, Art. 1, Sec. 8 Cl. 3 and the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

The Georgia Department of Revenue, Alcohol, Tobacco and Tax Unit has erroneously and illegally assessed and collected from James B. Beam Distilling Co. under the laws of the State of Georgia the aforementioned excise tax on distilled spirits, commencing with the inception of the imposition of the tax. Notwithstanding said imposition of the tax, this claim is for the years 1982, 1983 and 1984.

The basis for Beam's claim is the principle enunciated by the United States Supreme Court in *Bacchus Imports, Ltd. v. Herbert H. Dias, Director of taxation of the State of Hawaii,* 104 S. Ct. 3049 (1984), and *Metropolitan Life Insurance Company, et al. Appellants v. W. G. Ward, Jr., et al.,* 53 Lw 4399 (3/26/85). Copies of both decisions are attached hereto.

Georgia's excise tax on distilled spirits imposed a higher tax rate on distilled spirits *imported* into the state than on distilled spirits *manufactured* in the State of Georgia. This erroneous classification represented preferential tax treatment for distilled spirits product manufactured in the State of Georgia. In *Bacchus,* the Supreme Court concluded that a similar taxing structure in Hawaii had both the purpose and effect of discriminating in favor of local products (Commerce Clause), and more recently, the Supreme Court in *Metropolitan Life* held that Alabama's preferential tax statute violated the Equal Protection Clause.

(ATTACH LETTER SIZE SHEET IF MORE SPACE IS REQUIRED)

Under penalties of perjury, I declare that I have examined this claim, including supporting documents and statements, and to the best of my knowledge and belief, it is

true, correct and complete. Also I hereby declare no claim has been or will be made against any common carrier or insurance company for the amount of State excise tax claimed above.

By: Signature of Officer or General Manager

DATE

APPENDIX N

SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

JAMES B. BEAM DISTILLING CO., Plaintiff, v. **STATE OF GEORGIA, ZELL MILLER,** individually and as Governor of the State of Georgia, **MARCUS E. COLLINS,** individually and as Georgia State Revenue Commissioner, and **CLAUDE L. VICKERS,** individually and as Director of the Fiscal Division of the Department of Administrative Services, Defendants.	CIVIL ACTION FILE NO. D-42527 (Filed Oct. 7, 1992)

AMENDMENT TO COMPLAINT

James B. Beam Distilling Co. restates and realleges the allegations set forth in its Complaint filed in this matter on April 24, 1987, in full. The Plaintiff further states and alleges as follows:

CLAIM FOR DECLARATORY INJUNCTION

22.

In *James B. Beam Distilling Co. v. State of Georgia* ___ U.S. ___, 111 S.Ct. 2439 (1991), the United States Supreme Court held that its ruling in *Bacchus Imports, Ltd. v. Dias,*

468 U.S. 263, 104 S.Ct. 3049 (1984), and the Georgia Courts' prior rulings in the instant action (that O.C.G.A. § 3-4-60 is unconstitutional) must not be limited to prospective application, but must also be applied to the tax years at issue in this case, *to wit* 1982, 1983 and 1984.

23.

Since the decision of the United States Supreme Court in the instant case, the State of Georgia has enacted new legislation, 1992 Ga. Laws p. 1458, Act. No. 1036, approved April 13, 1992, (the "1992 Act"), as described below in an effort to deny the Plaintiff and other similarly situated alcohol beverages taxpayers a remedy; included within the 1992 Act is a purported repeal of the provision for interest on refunds of taxes paid under Georgia's Alcoholic Beverages Code.

24.

The United States Supreme Court's reversal of the Georgia Supreme Court's prospectivity limitation on its holding in this case launched a movement to amend O.C.G.A. § 3-4-60 (as facially amended in 1985) so as to equalize the tax.

25.

The Georgia General Assembly refused to amend O.C.G.A. § 3-4-60 to equalize the tax, deciding instead to continue the policy of discriminating against out-of-state beverage suppliers like the Plaintiff and fostering and

protecting in-state beverage suppliers by leaving the discriminatory 1985 version of O.C.G.A. § 3-4-60 intact.

26.

Instead of equalizing the tax so as to eliminate the 1985 statute's invalidity under United States law, the Georgia General Assembly with its enactment of the 1992 Act singled out alcohol beverage taxpayers, including the Plaintiff, from all other Georgia taxpayers for a special cut-off and elimination of remedies to enforce their claims of invalidity.

27.

Prior to April 13, 1992, the effective date of the 1992 Act, the only retrospective remedy under Georgia law for taxes erroneously or illegally assessed or collected that was available with respect to the taxes paid by the Plaintiff in this matter was the Refund Statute, O.C.G.A. § 48-2-35.

28.

The Refund Statute provided for the mandatory payment of a full refund of all taxes or fees "determined to have been erroneously or illegally assessed and collected . . . under the laws of this state, whether paid voluntarily or involuntarily."

29.

The Refund Statute provided for the payment of "interest on the amount of taxes or fees [erroneously or illegally assessed or collected] at the rate of 9% per annum from the date of payment of the tax or fee."

30.

In sections 5(d) and 6, the 1992 Act purported to repeal the provision for interest.

31.

The 1992 Act purported to repeal the interest provision even as to the taxes at issue in the instant case paid by the Plaintiff in 1982, 1983 and 1984.

32.

The 1992 Act purported to repeal the interest provision even though the Plaintiff had filed with the Revenue Commissioner an application for refund, and said application was filed years before the effectiveness of the 1992 Act.

33.

Both the purpose and the effect of the 1992 Act are to retaliate against and discriminate against the Plaintiff and other alcohol beverage taxpayers with claims of invalidity concerning the alcohol tax system of the State of Georgia and its protectionist treatment of in-state alcohol beverages and the suppliers of such beverages

through its discriminatory treatment of out-of-state alcohol beverages and the suppliers of such beverages.

34.

The 1992 Act's purported repeal of the interest provision is invalid with respect to interest on the claims at issue in this case in that the 1992 Act was enacted in violation of United States law.

35.

The 1992 Act's purported repeal of the interest provision is, as a retroactive law, unconstitutional and void with respect to interest on the taxes paid in this case in that it violates the Constitution of the State of Georgia, including, but not limited to, Article I, Section I, Paragraph X of the Constitution of the State of Georgia, entitled "Bill of attainder; ex post facto laws and retroactive laws"; Article I, Section I, Paragraph I of the Constitution of the State of Georgia, entitled "Life, liberty, and property"; Article I, Section I, Paragraph II of the Constitution of the State of Georgia, entitled "Protection to person and property; equal protection"; Article VII, Section III, Paragraph I of the Constitution of the State of Georgia, entitled "Taxation; purposes for which powers may be exercised"; Article III, Section VI, Paragraph I of the Constitution of the State of Georgia, entitled General powers"; Article I, Section II, Paragraph V of the Constitution of the State of Georgia, entitled "What acts void," and Article III, Section VI, Paragraph IV(a) of the Constitution of the State of Georgia entitled "Limitations on special legislation."

36.

The 1992 Act's purported repeal of the interest provision is, as a retroactive law, unconstitutional and void with respect to interest on the taxes paid in this case in that it violates the Constitution of the United States, including, but not limited to the Supremacy Clause of the United States Constitution, U.S. Const. Art. VI; the Commerce Clause of the United States Constitution, U.S. Const. art. I, § 8, cl.3; the Due Process Clause of the Fourteenth Amendment of the United States Constitution, U.S. Const. amend. XIV, § 1; the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, U.S. Const. amend. XIV, § 1; and the prohibition in the United States Constitution against passage by any state of "any Bill of Attainder, ex post facto law," U.S. Const. art. I, § 10, cl.1.

37.

The Plaintiff is entitled to a judgment declaring that the 1992 Act is void as against the Plaintiff insofar as it seeks to deprive the Plaintiff of its entitlement to interest under O.C.G.A. § 48-2-35 for taxes paid in 1982-1984.

PRAYER FOR RELIEF

WHEREFORE, the Plaintiff prays

(1) that this Court grant a refund of $2,252,096.75 for the taxes illegally assessed and collected from the Plaintiff from April 25, 1982 through December 31, 1984 under O.C.G.A. § 3-4-60, with interest;

(2) that the Court direct Defendants to take any and all action necessary to draw a refund from the State Treasury to the Plaintiff in the amount prayed;

(3) that the Court enter a judgment declaring that the 1992 Act is void and unconstitutional insofar as it seeks to deprive the Plaintiff of its entitlement to interest under O.C.G.A. § 48-2-35 for taxes paid in 1982-1984;

(4) that the Court award the Plaintiff its attorneys' fees and the cost of this action; and

(5) that the Court grant the Plaintiff such other and further relief as the Court may deem just and proper.

Respectfully submitted,

/s/ John L. Taylor, Jr. (CMc)
Attorney for Plaintiff
JAMES B. BEAM
DISTILLING CO.

OF COUNSEL:

Morton Siegel
Richard Schoenstadt
Siegel, Moses, Schoenstadt & Webster
10 East Huron Street
Chicago, Illinois 60611

John L. Taylor, Jr.
Georgia State Bar No. 700400
Celeste McCollough
Georgia State Bar No. 487013
Vincent, Chorey, Taylor & Feil
A Professional Corporation
Suite 1700, The Lenox Building
3399 Peachtree Road, N.E.
Atlanta, Georgia 30326
Telephone: (404) 841-3200

SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

JAMES B. BEAM DISTILLING CO., Plaintiff,	)	CIVIL ACTION
v.	)	FILE NO. D-42527
STATE OF GEORGIA, ZELL MILLER, individually and as Governor of the State of Georgia, **MARCUS E. COLLINS,** individually and as Georgia State Revenue Commissioner, and **CLAUDE L. VICKERS,** individually and as Director of the Fiscal Division of the Department of Administrative Services, Defendants.	)	

CERTIFICATE OF SERVICE

I, John L. Taylor, Jr., hereby certify that I have this day served a copy of the within and foregoing **AMENDMENT TO COMPLAINT** by hand delivery as follows:

David A. Runnion, Esquire
The Department of Law
132 State Judicial Building
Atlanta, Georgia 30334

This 7th day of October, 1992.

/s/ John L. Taylor, Jr. (CMc)
John L. Taylor, Jr.

APPENDIX O

SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

JAMES B. BEAM DISTILLING CO., Plaintiff, v. **STATE OF GEORGIA; JOE FRANK HARRIS,** individually; **ZELL MILLER,** individually and as Governor of the State of Georgia; **MARCUS E. COLLINS,** individually and as Georgia State Revenue Commissioner; and **CLAUDE L. VICKERS,** individually and as Director of the Fiscal Division of the Department of Administrative Services, Defendants.	CIVIL ACTION FILE NO. D-42527 (Filed December 23, 1992)

SECOND AMENDMENT TO COMPLAINT

Plaintiff James B. Beam Distilling Co. restates and realleges in full the allegations set forth in its Complaint filed in this matter on April 24, 1987 and set forth in its Amendment to Complaint filed in this matter on October 7, 1992. Plaintiff further states and alleges as follows:

I. GENERAL ALLEGATIONS

38.

On November 19, 1992, the Supreme Court of Georgia issued its opinion in the case styled *Reich v. Collins,*

Nos. S92A0621 & S92A0622 (hereinafter sometimes *"Reich"* or *"Reich v. Collins"*).

39.

Plaintiff herein was not a party to the *Reich* case at any stage of the proceedings in the *Reich* case.

40.

Plaintiff herein had no notice and no opportunity to be heard at any stage of the proceedings in the *Reich* case.

41.

Defendants herein were either parties to the Reich case or privies of parties to the *Reich* case.

42.

Defendants herein had both notice and an opportunity to be heard in the *Reich* case.

43.

According to the *Reich* opinion, the issue considered was the appellant taxpayer's "entitlement to a refund of state income taxes paid on his federal military retirement benefits in view of the United States Supreme Court's decision in *Davis v. Michigan*, 489 U.S. 803 (109 SC 1500, 103 LE2d 891) (1989)." *Reich*, slip op. at 1.

44.

The appellant taxpayer in the *Reich* case "brought [his] action pursuant to OCGA § 48-2-35." *Reich*, slip op. at 2.

45.

In Division 1 of its opinion in the *Reich* case, the Georgia Supreme Court stated that it "agree[d] with the trial court that the principles of *Davis v. Michigan* apply to this case." *Reich*, slip op. at 3 (footnote omitted).

46.

In Division 1 of its opinion in the *Reich* case, the Georgia Supreme Court also stated that it "conclude[d] that the trial court correctly held that OCGA § 47-7-27 violated the principles of *Davis v. Michigan*, but erred in holding that this case does not apply retroactively." *Reich*, slip op. at 6.

47.

In Division 2 of its opinion in the *Reich* case, the Georgia Supreme Court turned to the "issue of what remedy is to be afforded the appellant." *Reich*, slip op. at 7.

48.

After discussing the instant tax refund proceeding brought by Plaintiff herein, the Georgia Supreme Court

specifically addressed the situation presented by "a vendor/taxpayer." *Reich,* slip op. at 7-8.

49.

The appellant taxpayer in the *Reich* case was not a vendor/taxpayer, but Plaintiff herein might be characterized as a vendor/taxpayer.

50.

The Georgia Supreme Court went on to prescribe a rationale for denying a tax refund to a vendor/taxpayer.

51.

Division 2 of the opinion in the *Reich* case provides in full as follows:

> 2. The issue of what remedy is to be afforded the appellant remains. This is a question of state law. *Beam,* supra, 115 LE2d at 488. As the Supreme Court stated in *Beam,* nothing deprives the State of its "opportunity to raise procedural bars to recovery under state law or demonstrate reliance interests entitled to consideration in determining the nature of the remedy that must be provided. . . . " *Beam,* 115 LE2d at 494.
>
> OCGA § 48-2-35 (a) provides, in part, that "a taxpayer shall be refunded any and all taxes or fees which are determined to have been erroneously or illegally assessed and collected from him *under the laws of this state,* whether paid voluntarily or involuntarily . . . " (Emphasis

supplied.) We hold that this statute contemplates the situation where a taxing authority erroneously or illegally assesses and collects a tax under a valid law. It does not address the situation where the law under which the taxes are assessed and collected is itself subsequently declared to be unconstitutional or otherwise invalid. This distinction is significant in that the State must be able to rely on the laws under which it assesses taxes in order to promote stable and efficient government. Furthermore, this protects the State against those instances in which a vendor/taxpayer has recouped its tax expense by passing it onto the consumer. See, e.g., *Atlanta Americana Motor Hotel Corp. v. Undercofler*, 222 Ga. 295(1) (149 SE2d 691) (1966); *Blackmon v. Ga. Ind. Oilmen's Assn.*, 129 Ga.App. 169 (198 SE2d 900) (1973). Were we to interpret the statute differently, the vendor/taxpayer would realize a windfall or double recovery not intended by the legislature.

Thus we conclude that the taxpayer is not entitled to a refund under the provisions of OCGA § 48-2-35 (a).

We take this opportunity to hold that in cases in which a taxing statute is declared unconstitutional or otherwise void, a taxpayer must have made a demand for refund at the time the tax is paid or at the time his tax return is filed, whichever occurs last. Failure to do so bars any future claim.

52.

Upon information and belief, in addressing a claim for refund by a purported vendor/taxpayer, when no

such claimant was a party to the *Reich* case, the Georgia Supreme Court sought to control the outcome of the instant case without providing Plaintiff herein notice and an opportunity to be heard.

53.

Upon information and belief, in addressing a claim for refund by a purported vendor/taxpayer, when no such claimant was a party to the *Reich* case, the Georgia Supreme Court sought to interfere with the mandate of the United States Supreme Court in the instant case without providing Plaintiff herein notice and an opportunity to be heard.

54.

By letter dated December 9, 1992 and addressed to the Honorable Frank M. Hull, presiding Judge in the instant action, counsel for Defendants relied upon the *Reich* decision to demand that Plaintiff be denied relief.

55.

Throughout the course of the instant litigation, and up until the United States Supreme Court held that the tax at issue was unconstitutional during the years it was collected, the Defendants expressly admitted that the refund remedy set forth in O.C.G.A. § 48-2-35 provides the Plaintiff herein the proper remedy for alcohol taxes collected pursuant to an unconstitutional statute.

56.

The admissions referenced in the preceding paragraph included, but were not limited to, representations in judicio by the Defendants made at oral argument to the United States Supreme Court.

57.

Before the United States Supreme Court, the Defendants conceded that Georgia law does not require a taxpayer in the Plaintiff's position to take any action to give the State of Georgia any notice of a claim of unconstitutionally, such as the filing of a protest, when the taxpayer pays a tax pursuant to an unconstitutional statute in order for the taxpayer to be able to recover a refund.

58.

At no time prior to the opinion issued by the United States Supreme Court, including the two years during which the Plaintiff's claim for refund was pending before the Georgia Department of Revenue, did Defendants ever make any statement or take any action to lead the Plaintiff to believe that O.C.G.A. § 48-2-35 did not set forth the proper remedy for the Plaintiff to pursue.

II. CLAIMS FOR RELIEF

A. Claim for Declaratory Relief (O.C.G.A. Title 9, Chapter 4)

59.

Plaintiff hereby restates and realleges the allegations contained in Paragraphs 1-[] of the Complaint and of the

Amendment to Complaint and of the foregoing Second Amendment to Complaint as if set forth fully herein.

60.

Under the law of the instant case, the Georgia general refund statute, O.C.G.A. § 48-2-35, as codified during the time period relevant to this action, applies to Plaintiff's claims for a refund with interest, as asserted in this action.

61.

Further, by Defendants' admissions in judicio, the Georgia general refund statute, O.C.G.A. § 48-2-35, as codified during the time period relevant to this action, applies to Plaintiff's claims for a refund with interest, as asserted in this action.

62.

Further, the ruling in *Reich v. Collins* construing the Georgia general refund statute, O.C.G.A. § 48-2-35, is a direct overruling of the decision in *Collins v. Waldron*, 259 Ga. 582, 385 S.E.2d 74 (1989); as such and for other reasons, the ruling in *Reich*, to the extent it construes O.C.G.A. § 48-2-35, applies prospectively only to claims asserted after *Reich*.

63.

Further, the ruling in *Reich v. Collins* construing the Georgia general refund statute, O.C.G.A. § 48-2-35,

violates, both on its face and as applied, the United States Constitution, including the Supremacy Clause of the United States Constitution U.S. Const. art. VI; the Due Process Clause of the Fourteenth Amendment to the United States Constitution, U.S. Const. amend. XIV, § 1; and the principles of *Brinkerhoff-Faris Trust & Savings Co. v. Hill*, 281 U.S. 673, 50 S. Ct. 451 (1930), and of all similar predecessor cases and of all progeny.

64.

Further, the ruling in *Reich v. Collins* construing the Georgia general refund statute, O.C.G.A. § 48-2-35, violates, both on its face and as applied, the United States Constitution, including the Supremacy Clause of the United States Constitution, U.S. Const. art. VI, and the principles of *Testa v. Katt*, 330 U.S. 386, 67 S. Ct. 810 (1947), and of all similar predecessor cases and of all progeny.

65.

Further, the ruling in *Reich v. Collins* construing the Georgia general refund statute, O.C.G.A. § 48-2-35, violates, both on its face and as applied, the United States Constitution, including the Supremacy Clause of the United States Constitution, U.S. Const. art. VI, and the principles of *Ward v. Board of County Comm'rs*, 253 U.S. 17, 40 S. Ct. 419 (1920), and of all similar predecessor cases and of all progeny by putting forward nonfederal grounds of decision that are without any fair or substantial support.

66.

There exists an actual controversy between and among the parties with respect to their rights, status, and other legal relations.

67.

Plaintiff is therefore entitled under O.C.G.A. Title 9, Chapter 4 to a judgment declaring, among other things, that the Georgia general refund statute, O.C.G.A. § 48-2-35, as codified during the time period relevant to this action, applies to the claims for a refund with interest, as asserted by Plaintiff in this action, so as to entitle Plaintiff to a refund with interest.

D. Claim Under 42 U.S.C. § 1983

68.

Plaintiff hereby restates and realleges the allegations contained in Paragraphs 1-[] of the Complaint and of the Amendment to Complaint and of the foregoing Second Amendment to Complaint as if set forth fully herein.

69.

Plaintiff has been subjected and continues to be subjected to the deprivation of rights, privileges, or immunities secured by the Supremacy Clause of the United States Constitution, U.S. Const. art. VI; the Commerce Clause of the United States Constitution, U.S. Const. art. I, § 8, cl.3; the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, U.S.

Const. amend. XIV, § 1; the Due Process Clause of the Fourteenth Amendment to the United States Constitution, U.S. Const. amend. XIV, § 1, and the principles of *McKesson Corp. v. Division of Alcohol Beverages & Tobacco*, 496 U.S. 18, 110 S. Ct. 2238 (1990), and of all similar predecessor cases and of all progeny; and the mandate of the United States Supreme Court in *James B. Beam Distilling Co. v. Georgia*, 501 U.S. ___, 111 S. Ct. 2439 (1991).

70.

Plaintiff is entitled under 42 U.S.C. § 1983 to a refund with interest to redress these deprivations.

E. Claim Under United States Constitution

71.

Plaintiff hereby restates and realleges the allegations contained in Paragraphs 1-[] of the Complaint and of the Amendment to Complaint and of the foregoing Second Amendment to Complaint as if set forth fully herein.

72.

Plaintiff has been subjected and continues to be subjected to the deprivation of rights, privileges, or immunities secured by the Supremacy Clause of the United States Constitution, U.S. Const. art. VI; the Commerce Clause of the United States Constitution, U.S. Const. art. I, § 8, cl.3; the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, U.S. Const. amend. XIV, § 1; the Due Process Clause of the

Fourteenth Amendment to the United States Constitution, U.S. Const. amend. XIV, § 1, and the principles of *McKesson Corp. v. Division of Alcohol Beverages & Tobacco,* 496 U.S. 18, 110 S. Ct. 2238 (1990), and of all similar predecessor cases and of all progeny; and the mandate of the United States Supreme Court in *James B. Beam Distilling Co. v. Georgia,* 501 U.S. ___, 111 S. Ct. 2439 (1991).

73.

Plaintiff is entitled under the Due Process Clause of the Fourteenth Amendment to the United States Constitution, U.S. Const. amend. XIV, § 1, and the principles of *McKesson Corp. v. Division of Alcohol Beverages & Tobacco,* 496 U.S. 18, 110 S. Ct. 2238 (1990), and of all similar predecessor cases and of all progeny (and/or under the Supremacy Clause of the United States Constitution, U.S. Const. art. VI; the Commerce Clause of the United States Constitution, U.S. Const. art. I, § 8, cl.3; the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, U.S. Const. amend. XIV, § 1; and/or the mandate of the United States Supreme Court in *James B. Beam Distilling Co. v. Georgia,* 501 U.S. ___, 111 S. Ct. 2439 (1991)) to a refund with interest.

F. Claim Under 42 U.S.C. § 1988

74.

Plaintiff hereby restates and realleges the allegations contained in Paragraphs 1-[] of the Complaint and of the Amendment to Complaint and of the foregoing Second Amendment to Complaint as if set forth fully herein.

75.

Plaintiff is entitled under 42 U.S.C. § 1988 to costs and to its reasonable attorneys' fees as part of the costs.

III. PRAYER FOR RELIEF

WHEREFORE, Plaintiff James B. Beam Distilling Co. respectfully prays as follows:

(a) That the Court enter a judgment in favor of Plaintiff declaring that the Georgia general refund statute, O.C.G.A. § 48-2-35, as codified during the time period relevant to this action, applies to the claims for a refund with interest, as asserted by Plaintiff in this action;

(b) That the Court enter a judgment in favor of Plaintiff declaring that the 1992 Act is void and unconstitutional insofar as it seeks to deprive Plaintiff of its entitlement to interest under O.C.G.A. § 48-2-35 for taxes paid in 1982-1984;

(c) That the Court enter a judgment in favor of Plaintiff awarding a refund in the amount of, or enter a judgment in favor of Plaintiff directing the award of a refund in the amount of, $2,252,096.75 for the taxes erroneously or illegally assessed and collected from Plaintiff from April 26, 1982 through December 31, 1984 under O.C.G.A. § 3-4-60, with interest;

(d) That the Court direct Defendants to take any and all action necessary to draw a refund with interest from the State Treasury to the Plaintiff in the amount prayed;

(e) That Plaintiff be granted prejudgment interest;

(f) That Plaintiff be granted its reasonable attorneys' fees;

(g) That Plaintiff be granted the costs of this litigation; and

(h) That the Court grant Plaintiff such other and further relief as the Court may deem just and proper.

Respectfully Submitted,

/s/ Celeste McCollough
Attorney for Plaintiff
JAMES B. BEAM DISTILLING COMPANY

OF COUNSEL:

Morton Siegel
Richard Schoenstadt
Siegel, Moses, Schoenstadt & Webster
10 East Huron Street
Chicago, Illinois 60611

John L. Taylor, Jr.
Georgia State Bar No. 700400
Celeste McCollough
Georgia State Bar No. 487013
Vincent, Chorey, Taylor & Feil
A Professional Corporation
Suite 1700, The Lenox Building
3399 Peachtree Road, N.E.
Atlanta, Georgia 30326
Telephone: (404) 841-3200

CERTIFICATE OF SERVICE

This is to certify that I have this day served a true and correct copy of the foregoing **SECOND AMENDMENT TO COMPLAINT** by hand delivery addressed as follows:

David A. Runnion
Senior Assistant Attorney General
40 Capital Square – Room 132
132 State Judicial Building
Atlanta, Georgia 30334

This 23rd day of December, 1992.

/s/ Celeste McCollough
Celeste McCollough
Attorney for
JAMES B. BEAM
DISTILLING CO.

APPENDIX P

IN THE SUPERIOR COURT OF FULTON COUNTY

STATE OF GEORGIA

HEUBLEIN, INC., a Connecticut Corporation, Plaintiff, vs. STATE OF GEORGIA, JOE FRANK HARRIS, individually and as Governor of the State of Georgia, MARCUS E. COLLINS, individually and as Georgia State Revenue Commissioner, and CLAUDE L. VICKERS, individually and as Director of the Fiscal Division of the Department of Administrative Services, Defendants.	CIVIL ACTION FILE NO. D-20634 (Filed May 12, 1985)

ORDER

On April 1, 1985, O.C.G.A. §§ 3-4-60 and 3-6-50 were amended so as to change the taxation of alcoholic beverages sold within this State. Under the new law, all distilled spirits and wines are subject to an alcohol excise tax, and all imported distilled spirits and wines are subject to an additional import tax. Plaintiff challenges the authority of the State of Georgia to impose the import tax under any circumstances, and seeks, among other things, a judicial declaration that the Georgia import tax on alcoholic beverages is unconstitutional. In addition,

Plaintiff seeks a preliminary injunction enjoining the assessment and collection of said taxes during the pendency of this litigation.

The Complaint focuses upon legislation which was approved by the Georgia Legislature, and signed by the Governor on April 1, 1985. The Act by the Legislature amended Title 3 of The Official Code of Georgia, said title relating to the establishment of excise taxes of alcohol, distilled spirits, table wines and dessert wines. The Amendment struck in its entirety Code § 3-4-60 relating to the levy and amount of State excise taxes imposed on alcohol and distilled spirits, and inserting in its place § 3-4-60.

The Plaintiff, Heublein, Inc., a Connecticut Corporation, and a producer and importer of distilled spirits and wine, contend that the amended Act is in violation of the Interstate Commerce Clause and the Equal Protection Clause. The Plaintiff contends that non-resident producers pay tax which is 50% higher than in-state producers of spirits.

There are four prerequisites for the issuance of a preliminary injunction: (1) a substantial likelihood that the movant will prevail on ther [sic] merits; (2) a substantial threat that the movant will suffer irreparable harm if the injunction is not granted; (3) that the threatened injury to the movant outweighs the threatened harm an injunction may cause the opponent; and (4) that the granting of the preliminary injunction will not disserve the public interest. *Southern Monorail Co. v. Robbins & Myers, Inc.*, 666 F.2d 185 (5th Cir. 1982); *Compact Van*

Equipment Co. v. Leggett & Platt, Inc., 566 F.2d 952 (5th Cir. 1978).

It is well established that if Plaintiff prevails on final judgment, it will be entitled to procedures set up in the Revenue Code whereby it may seek a refund of the taxes paid under the challenged statute. Case law makes it clear that mere threatened monetary injury, which can be redressed in damages, is insufficient to establish the irreparable injury essential to the issuance of a preliminary injunction. See *Corbin v. Corbin*, 429 F. Supp. 276, 282 (M.D. Ga. 1977), *citing Sampson v. Murray*, 416 U.S. 61 (1974); *see also Georgia Gazette Pub. Co. v. U.S. Dept. of Defense*, 562 F. Supp. 1004, 1010 (S.D. Ga. 1983) ("It is well-settled that the temporary loss of money is not an irreparable injury.")

The Court finds the Plaintiff has failed to carry its burden of proof with regard to the prerequisites to preliminary injunctive relief. A preliminary injunction will not issue unless the Movant carries the burden as to prerequisites. Having found the Plaintiff will not suffer irreparable harm if the preliminary injunction is not granted,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the prayer for preliminary injunction be and the same is hereby DENIED. *Southern Monorail Co. v. Robbins & Myers, Inc.*, 666 F.2d 185, 186 (5th Cir. 1982), *citing Vision Center v. Opticks, Inc.*, 596 F. 2d 111, 114 (5th Cir. 1979), *cert. denied*, 444 U.S. 1016 (1980).

IT IS FURTHER ORDERED the Motion for Declaratory Judgment be placed upon the calendar for further

hearing so that the Court may enter final judgment in said matter.

SO ORDERED, this 12th day of May, 1985.

/s/ Osgood O. Williams
OSGOOD O. WILLIAMS
JUDGE, FULTON SUPERIOR COURT
ATLANTA JUDICIAL CIRCUIT

Copy to:

Morton Siegel, Esq.
Michael A. Moses, Esq.
James L. Webster, Esq.
Siegel, Denberg, Vanasco,
Shukovsky, Moses & Schoenstadt
Attorneys at Law
Suite 1700, Avondale Centre
Twenty North Clark Street
Chicago, Illinois 60602

John L. Taylor, Jr., Esq.
John L. Schaub, Esq.
McDaniel, Chorey & Taylor
A professional Corporation
Suite 500, Candler Building
127 Peachtree Street, N. E.
Atlanta, Georgia 30303

Michael J. Bowers
Attorney General
Jeff L. Milsteen, Attorney at Law
132 State Judicial Building
Atlanta, Georgia 30334

APPENDIX Q

Georgia Department of Revenue Administrative Rule No. 560-2-3-.09 Non-Registered Brands; Affixing Tax Stamp. Amended. No person shall move or cause to be moved into Georgia or receive, hold, purchase, give away, sell, or offer to sell in Georgia any distilled spirits unless the brand thereof shall have first been registered with and approved by the Commissioner or his agent as provided in Regulation 560-2-3-.24 nor unless each individual container of such distilled spirits shall have affixed thereto at all times a tax stamp showing full payment of all the taxes thereon. Tax stamps shall be purchased and affixed to containers by producers prior to shipment except as otherwise authorized by the Commissioner. The purchase price of tax stamps shall include the amount of excise tax and the cost of printing and handling.

APPENDIX R

O.C.G.A. § 3-1-2. Definitions.

As used in this title, the term:

* * *

(21) "Taxpayer" means any person made liable by law to file a return or to pay tax.

* * *

APPENDIX S

O.C.G.A. § 3-1-4. Penalty for violations of provisions of title.

(a) It is unlawful for any person knowingly and intentionally to violate any criminal prohibition contained in this title.

(b) Except as otherwise provided in this title, any person who violates any criminal prohibition contained in this title shall be guilty of a misdemeanor.

APPENDIX T

O.C.G.A. § 3-2-3. Powers and duties of commissioner as to denial, suspension, or cancellation of licenses generally; promulgation of rules and regulations as to conversion of standards of measurement to English system; promulgation of rules and regulations as to labeling of distilled spirits.

In addition to his other duties and responsibilities to administer this title, the commissioner may:

(1) Deny, suspend, or cancel any license required under this title if:

(A) The license application is not filed in good faith or is filed by some person as a subterfuge for any other person;

(B) Any applicant for a license or any licensee under this title willfully fails to comply with any provisions of this title or with rules and regulations adopted by the commissioner; or

(C) Any person to whom a license has been issued is no longer engaged in the dealing of alcoholic beverages or no longer qualifies as a licensee under this title.

Before any denial, suspension, or cancellation of a license granted pursuant to this title, the applicant or licensee shall be afforded a hearing in the manner and subject to the conditions and procedures established by this chapter and the commissioner. The commissioner shall notify an applicant or licensee in writing of the denial, suspension, or cancellation by registered or certified mail to the last known address of the

applicant or licensee appearing in the commissioner's files or by personal service upon the applicant or licensee by an authorized agent of the commissioner. Upon cancellation of a license for cause under this paragraph, there shall be no renewal or reissuance of the canceled license for a period of two years from the date of cancellation;

(2) In the event that the license of any person is canceled by the commissioner under the authority of this title, hold the bonds of the person for a period of three years against any liabilities accruing as a result of the business of the person whose license is canceled. In no event shall the surrender of any bond release any liability;

(3) Enter into agreements with appropriate authorities of other states who enforce the alcoholic beverage laws thereof, to exchange information relative to the manufacture, receipt, sale, use, or transportation of alcoholic beverages;

(4) Promulgate rules and regulations which he deems necessary for the conversion from the metric system of measurement to the equivalent English measurement in United States gallons and subdivisions of gallons and shall compute all tax rates at the equivalent English measurement; and

(5) Promulgate rules and regulations, not inconsistent with federal laws or regulations, requiring informative labeling of all distilled spirits offered for sale in this state.

APPENDIX U

O.C.G.A. § 3-2-11. Penalties for failure to file reports or returns or to pay tax or fee; procedure for assessment of taxes due, penalties, and interest.

Except as otherwise provided in this title:

(1) When any person required to file a report as provided by this title fails to file the report within the time prescribed, he shall be assessed a penalty of $50.00 for each failure to file.

(2) In the event the commissioner determines, upon inspection of the invoices, books, and records of a licensed wholesale dealer or importer or from any other information obtained by him or his authorized agents, that the licensed wholesale dealer or importer has not paid the proper tax or the proper amount of taxes, the wholesale dealer or importer shall be assessed for the taxes due. After assessment, the person assessed shall be provided with notice and an opportunity for a hearing as provided for contested cases by Chapter 13 of Title 50, the "Georgia Administrative Procedure Act."

(3) When any person fails to pay any tax or license fee due as provided by this title, the person shall be assessed penalty the same as that provided for in Code Section 48-2-44.

(4) When any person fails to file a return, files a false or fraudulent return, or when a tax deficiency or any part of a tax deficiency is due to a fraudulent intent to evade any tax imposed or authorized by this title, the

person shall be assessed a specific penalty of 50 percent of the tax due.

(5) When any person fails to pay the tax or any part of the tax due as provided by this title, the person shall pay interest on the unpaid tax at the rate of 1 percent per month from the time the tax became due until paid or at the rate specified in Code Section 48-2-40, whichever is greater. Interest shall be computed on a monthly basis for any portion of a month during which payment is delinquent.

(6) All penalties and interest imposed by this title shall be payable to and collected by the commissioner in the same manner as if they were a part of the taxes imposed by this title.

APPENDIX V

O.C.G.A. § 3-2-12. Waiver of penalties by commissioner.

The commissioner may waive, in whole or in part, the collection of any amount due the state as a penalty under this title whenever, or to the extent that, he reasonably determines that the default giving rise to the penalty was due to reasonable cause and not due to gross or willful neglect or disregard of the law or of regulations or instructions pertaining to the law.

APPENDIX W

O.C.G.A. § 3-2-33. Sale, possession, concealment, storage, or conveyance of untaxed alcoholic beverages; declaration of untaxed or otherwise unlawful alcoholic beverages as contraband; seizure and disposition of contraband alcoholic beverages generally.

(a) Except as otherwise specifically provided for by law, it is unlawful for any person to sell, possess, conceal, store or convey any alcoholic beverage on which any tax or license fee imposed by this title has not been paid.

(b) Any peace officer or authorized agent of the commissioner shall declare as contraband any alcoholic beverage:

(1) Not bearing the required tax stamps or markings as provided by this title or not reported for collection of taxes under a reporting system established by the commissioner;

(2) Found in any county, municipality, or unincorporated area of any county where the sale of alcoholic beverages is not lawful when the alcoholic beverage is intended for use or sale contrary to law; or

(3) Sold, conveyed, or possessed, concealed, stored, or held for sale by any person who has not first obtained all licenses required by this title.

(c) Except as otherwise provided in this title, all contraband alcoholic beverages seized shall be immediately delivered to the commissioner or to persons designated by him to receive the contraband alcoholic beverages.

APPENDIX X

O.C.G.A. § 3-2-34. Disposition of contraband alcoholic beverages; seizure; destruction; sale; retention of small quantity for evidence.

(a) All alcoholic beverages upon which no taxes have been paid to this state or any other state and which are not specifically exempt from the taxes imposed by law shall be destroyed by the peace officer or agent of the commissioner seizing the beverages, except that a small quantity of the illicit alcoholic beverage may be retained for purposes of evidence in the proper court; and then the illicit alcoholic beverage shall be destroyed immediately.

(b) All contraband alcoholic beverages upon which the taxes have been paid either to this state or to any other state shall be either destroyed or sold at public sale as provided by law.

APPENDIX Y

O.C.G.A. § 3-2-36. Arrest and prosecution of violators of title.

The commissioner or his agents shall secure warrants or other criminal process against any person who violates any provision of this title in counties and municipalities where the sale of alcoholic beverages is not authorized and in counties and municipalities where the sale of alcoholic beverages is authorized but where the alcoholic beverages are being sold contrary to law. The commissioner or his agents shall prosecute such offenders.

APPENDIX Z

O.C.G.A. § 3-3-1. Declaration of business of manufacturing, selling, and other dealings in alcoholic beverages as privilege subject to regulatory requirements.

The businesses of manufacturing, distributing, selling, handling, and otherwise dealing in or possessing alcoholic beverages are declared to be privileges in this state and not rights; however, such privileges shall not be exercised except in accordance with the licensing, regulatory, and revenue requirements of this title.

APPENDIX AA

O.C.G.A. § 3-3-3. Licenses required to distribute, sell or otherwise deal in alcoholic beverages; display of licenses.

(a) No person shall manufacture, distribute, sell, handle, or possess for sale, or otherwise deal in, alcoholic beverages without first obtaining all applicable licenses required by this title.

(b) Each person holding a license issued pursuant to this title shall display the license prominently at all times on the premises for which the license is issued.

APPENDIX BB

O.C.G.A. § 3-3-9. Penalty for violations of prohibitions in chapter.

(a) It is unlawful for any person knowingly and intentionally to violate any prohibition contained in this chapter.

(b) Except as otherwise provided in this chapter, any person who violates any prohibition contained in this chapter shall be guilty of a misdemeanor.

APPENDIX CC

O.C.G.A. § 3-3-27. Unlawful manufacture, transportation, receipt, possession, sale, or distribution of alcoholic beverages; failure to file proper reports or bonds or pay fees; declaration of apparatus used in unlawful manufacture of alcoholic beverages as contraband; penalties.

(a) No person knowingly and intentionally shall:

(1) Distill, manufacture, or make any distilled spirits, except as permitted by this title;

(2) Manufacture, make, brew, or ferment any malt beverages or wine, except as permitted by this title;

(3) Transport, ship, receive, possess, sell, offer to sell, distribute, or in any manner use any alcoholic beverages or alcohol, except as permitted by this title;

(4) Fail to file any report required by this title;

(5) File any report required by this title that is either intentionally false or fraudulent, or both;

(6) Fail to pay any tax or license fee imposed or authorized by this title unless specifically exempted from such payment;

(7) Fail to have a sufficient bond filed with the commissioner as required by this title; or

(8) Evade or violate, or conspire to evade or violate, any provision of this title.

(b) Any apparatus, article, or other tangible personal property used in the unlawful distillation, manufacture, or making of any alcoholic beverages is declared contraband and shall be destroyed by the officers or agents seizing the property or otherwise disposed of as the commissioner directs.

(c) Any person who violates the provisions of:

(1) Paragraph (1) of subsection (a) of this Code section shall be guilty of a felony and, upon conviction thereof, shall be punished by imprisonment for not less than one year nor more than five years;

(2) Paragraphs (2) through (8) of subsection (a) of this Code section shall be guilty of a misdemeanor.

APPENDIX DD

O.C.G.A § 3-3-29. Possession, sale, or purchase of unstamped distilled spirits.

Except as otherwise expressly provided for by law, no person knowingly and intentionally shall possess, sell, or purchase any distilled spirits not bearing proper tax stamps indicating the payment of any tax imposed by this title if the stamps are required by or authorized pursuant to this title.

APPENDIX EE

O.C.G.A. § 3-4-60. Levy and amount of tax.

The following state excise taxes are levied and imposed:

(1) On the importation of all distilled spirits imported into this state, a tax of $1.00 per liter and on all alcohol imported into this state, a tax of $1.40 per liter, and a proportionate tax at the same rate on all fractional parts of a liter;

(2) On the manufacture of all distilled spirits manufactured in this sate [sic] from Georgia-grown products, a tax of $ .50 per liter and on all alcohol manufactured in this state from Georgia-grown products, a tax of $ .70 per liter, and a proportionate tax at the same rate on all fractional parts of a liter.

APPENDIX FF

O.C.G.A. § 3-4-61. Collection of tax; replacement of mutilated stamps.

(a) Except as may otherwise be authorized in this title, the state excise taxes imposed by this part shall be collected in the following manner:

(1) The commissioner shall prescribe suitable stamps in proper denominations denoting the payment of taxes imposed by this part, and the tax provided shall be administered and collected by means of adhesive stamps lithographed with an intricate geometric design on safety paper or in a manner as may be prescribed by the commissioner;

(2) Before shipment or delivery to any retailer, every manufacturer or wholesaler shall affix or cause to be affixed to each bottle or container of distilled spirits a stamp indicating the payment of the proper amount of tax; and

(3) All manufacturers, distillers, or wholesalers who sell, ship, or deliver to each other shall affix or cause to be affixed to each bottle or container of distilled spirits a stamp indicating the payment of the proper amount of tax.

(b) The commissioner may at his discretion replace mutilated stamps when fully satisfied that the stamps have not been used.

APPENDIX GG

O.C.G.A. § 9-4-1. Purpose and construction of chapter.

The purpose of this chapter is to settle and afford relief from uncertainty and insecurity with respect to rights, status, and other legal relations; and this chapter is to be liberally construed and administered.

APPENDIX HH

O.C.G.A. § 9-4-2. Declaratory judgments authorized; force and effect.

(a) In cases of actual controversy, the respective superior courts of this state shall have power, upon petition or other appropriate pleading, to declare rights and other legal relations of any interested party petitioning for such declaration, whether or not further relief is or could be prayed; and the declaration shall have the force and effect of a final judgment or decree and be reviewable as such.

(b) In addition to the cases specified in subsection (a) of this Code section, the respective superior courts of this state shall have power, upon petition or other appropriate pleading, to declare rights and other legal relations of any interested party petitioning for the declaration, whether or not further relief is or could be prayed, in any civil case in which it appears to the court that the ends of justice require that the declaration should be made; and the declaration shall have the force and effect of a final judgment or decree and be reviewable as such.

(c) Relief by declaratory judgment shall be available, notwithstanding the fact that the complaining party has any other adequate legal or equitable remedy or remedies.

APPENDIX II

O.C.G.A. § 9-4-3. Further relief; interlocutory extraordinary relief to preserve status quo.

(a) Further plenary relief, legal or equitable, including but not limited to damages, injunction, mandamus, or quo warranto, may be sought in a petition seeking declaratory judgment, and in such case, the action shall be governed as to process, service, and procedure by Code Section 9-4-5. In all such cases, the court shall award to the petitioning party such relief as the pleadings and evidence may show him to be entitled; and the failure of the petition to state a cause of action for declaratory relief shall not affect the right of the party to any other relief, legal or equitable, to which he may be entitled.

(b) The court, in order to maintain the status quo pending the adjudication of the questions or to preserve equitable rights, may grant injunction and other interlocutory extraordinary relief in substantially the manner and under the same rules applicable in equity cases.

APPENDIX JJ

O.C.G.A. § 9-5-8. Grant of injunctions in discretion of court; power to be exercised cautiously.

The granting and continuing of injunctions shall always rest in the sound discretion of the judge, according to the circumstances of each case. This power shall be prudently and cautiously exercised and, except in clear and urgent cases, should not be resorted to

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APPENDIX KK

O.C.G.A. § 9-11-65. Injunctions and restraining orders.

(a) *Interlocutory injunction.*

(1) NOTICE. No interlocutory injunction shall be issued without notice to the adverse party.

(2) CONSOLIDATION OF HEARING WITH TRIAL ON MERITS. Before or after the commencement of the hearing of an application for an interlocutory injunction, the court may order the trial of the action on the merits to be advanced and consolidated with the hearing of the application. Even when this consolidation is not ordered, any evidence received upon an application for an interlocutory injunction which would be admissible upon the trial on the merits shall become a part of the record on the trial and need not be repeated upon the trial. This paragraph shall be construed and applied so as to save any rights of the parties which they may have to trial by jury.

(b) *Temporary restraining order; when granted without notice; duration; hearing; application to dissolve or modify.* A temporary restraining order may be granted without written or oral notice to the adverse party or his attorney only if:

(1) It clearly appears from specific facts shown by affidavit or by the verified complaint that immediate and irreparable injury, loss, or damage will result to the applicant before the adverse party or his attorney can be heard in opposition; and

(2) The applicant's attorney certifies to the court, in writing, the efforts, if any, which have been made to give the notice and the reasons supporting the party's claim that notice should not be required.

Every temporary restraining order granted without notice shall be endorsed with the date and hour of issuance, shall be filed forthwith in the clerk's office and entered of record, and shall expire by its terms within such time after entry, not to exceed 30 days, as the court fixes, unless the party against whom the order is directed consents that it may be extended for a longer period. In case a temporary restraining order is granted without notice, the motion for an interlocutory injunction shall be set down for hearing at the earliest possible time and shall take precedence over all matters except older matters of the same character; when the motion comes on for hearing, the party who obtained the temporary restraining order shall proceed with the application for an interlocutory injunction; and, if he does not do so, the court shall dissolve the temporary restraining order. On two days' notice to the party who obtained the temporary restraining order without notice or on such shorter notice to that party as the court may prescribe, the adverse party may appear and move its dissolution or modification; and in that event the court shall proceed to hear and determine the motion as expeditiously as the ends of justice require.

(c) *Security.* As a prerequisite to the issuance of a restraining order or an interlocutory injunction, the court may require the giving of security by the applicant, in such sum as the court deems proper, for the payment of such costs and damages as may be incurred or suffered

by any party who is found to have been enjoined or restrained wrongfully. A surety upon a bond or undertaking under this Code section submits himself to the jurisdiction of the court and irrevocably appoints the clerk of the court as his agent upon whom any papers affecting his liability on the bond or undertaking may be served. His liability may be enforced on motion without the necessity of an independent action. The motion and such notice of the motion as the court prescribes may be served on the clerk of the court, who shall forthwith mail copies to the persons giving the security if their addresses are known.

(d) *Form and scope of injunction or restraining order.* Every order granting an injunction and every restraining order shall be specific in terms; shall describe in reasonable detail, and not by reference to the complaint or other document, the act or acts sought to be restrained; and is binding only upon the parties to the action, their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them who receive notice of the order by personal service or otherwise.

(e) *When inapplicable.* This Code section is not applicable to actions for divorce, alimony, separate maintenance, or custody of children. In such actions, the court may make prohibitive or mandatory orders, with or without notice or bond, and upon such terms and conditions as the court may deem just.

APPENDIX LL

O.C.G.A. § 48-1-2. Definitions.

As used in this title, the term:

* * *

(25) "Taxpayer" means any person required by law to file a return or to pay taxes.

* * *

APPENDIX MM

O.C.G.A. § 48-2-35. Refunds.

(a) A taxpayer shall be refunded any and all taxes or fees which are determined to have been erroneously or illegally assessed and collected from him under the laws of this state, whether paid voluntarily or involuntarily, and shall be refunded interest on the amount of the taxes or fees at the rate of 9 percent per annum from the date of payment of the tax or fee to the commissioner. Refunds shall be drawn from the treasury on warrants of the Governor issued upon itemized requisitions showing in each instance the person to whom the refund is to be made, the amount of the refund, and the reason for the refund.

(b)(1) A claim for refund of a tax or fee erroneously or illegally assessed and collected may be made by the taxpayer at any time within three years after the date of the payment of the tax or fee to the commissioner. Each claim shall be filed in writing in the form and containing such information as the commissioner may reasonably require and shall include a summary statement of the grounds upon which the taxpayer relies. Should any person be prevented from filing such an application because of his own or his counsel's service in the armed forces during such period, the period of limitation shall date from his or her counsel's discharge from the service.

(2) In the event the taxpayer desires a conference or hearing before the commissioner in connection with any claim for refund, he shall specify such desire in writing in the claim and,

if the claim conforms with the requirements of this Code section, the commissioner shall grant a conference at a time he shall reasonably specify.

(3) The commissioner or his delegate shall consider information contained in the taxpayer's claim for refund, together with such other information as may be available, and shall approve or disapprove the taxpayer's claim and notify the taxpayer of this action.

(4) Any taxpayer whose claim for refund is denied by the commissioner or his delegate or whose claim is not decided by the commissioner or his delegate within one year from the date of filing the claim shall have the right to bring an action for a refund in the superior court of the county of the residence of the taxpayer, except that:

(A) If the taxpayer is a public utility or a nonresident, the taxpayer shall have the right to bring an action for a refund in the superior court of the county in which is located the taxpayer's principal place of doing business in this state or in which the taxpayer's chief or highest corporate officer or employee resident in this state maintains his office; or

(B) If the taxpayer is a nonresident individual or foreign corporation having no place of doing business and no officer or employee resident maintaining his office in this state, the taxpayer shall have the right to bring an action for a refund in the Superior Court of Fulton County or in the superior court of the county in which the commissioner in office at the time the action is filed resides.

(5) No action or proceeding for the recovery of a refund under this Code section shall be commenced before the expiration of one year from the date of filing the claim for refund unless the commissioner or his delegate renders a decision on the claim within that time, nor shall any action or proceeding be commenced after the expiration of two years from the date the claim is denied. The two-year period prescribed in this paragraph for filing an action for refund shall be extended for such period as may be agreed upon in writing between the taxpayer and the commissioner during the two-year period or any extension thereof.

(c) In the event any taxpayer's claim for refund is approved by the commissioner or his delegate and the taxpayer has not paid other state taxes which have become due, the commissioner or department may set off the unpaid taxes against the refund. When the setoff authorized by this subsection is exercised, the refund shall be deemed granted and the amount of the setoff shall be considered for all purposes as a payment toward the particular tax debt which is being set off. Any excess refund remaining after the setoff has been applied shall be refunded to the taxpayer.

APPENDIX NN

O.C.G.A. § 48-2-40. Rate of interest on past due taxes.

Except as otherwise expressly provided by law, taxes owed the state or any local taxing jurisdiction shall bear interest at the rate of 1 percent per month from the date the tax is due until the date the tax is paid. For the purposes of this Code section, any period of less than one month shall be considered to be one month. This Code section shall also apply to alcoholic beverage taxes.

APPENDIX OO

O.C.G.A. § 48-2-44. Penalty and interest on failure to file return or pay revenue held in trust for state; penalty and interest on willful failure to pay ad valorem tax.

(a) In any instance in which any person willfully fails to file a report, return, or other information required by law or willfully fails to pay the commissioner any revenue held in trust for the state, he shall pay, in the absence of a specific statutory civil penalty for the failure, a penalty of 10 percent of the amount of revenue held in trust and not paid on or before the time prescribed by law, together with interest on the principal amount at the rate specified in Code Section 48-2-40 from the date the return should have been filed or the revenue held in trust should have been remitted until it is paid.

(b) (1) In any instance in which any person willfully fails, on or after July 1, 1981, to pay, within 90 days of the date when due, any ad valorem tax owed the state or any local government, he shall pay, in the absence of a specific statutory civil penalty for the failure, a penalty of 10 percent of the amount of tax due and not paid on or before the time prescribed by law, together with interest as specified by law. This 10 percent penalty shall not, however, apply in the case of:

(A) Ad valorem taxes of $500.00 or less on homestead property as defined in Part 1 of Article 2 of Chapter 5 of this title; or

(B) With respect to tax year 1986 and future tax years, ad valorem taxes of any amount on

homestead property as defined in Part 1 of Article 2 of Chapter 5 of this title, if the homestead property was during the tax year acquired by a new owner who did not receive a tax bill for the tax year and who immediately before acquiring the homestead property resided outside the State of Georgia and if the taxes are paid within one year following the due date.

(2) Any city or county authorized as of April 22, 1981, by statute or constitutional amendment to receive a penalty of greater than 10 percent for failure to pay an ad valorem tax is authorized to continue to receive that amount.

APPENDIX PP

O.C.G.A. § 48-2-54. Action by commissioner to collect unpaid tax.

In the event any taxpayer fails to pay any tax due, the commissioner shall notify the taxpayer and his surety or sureties by mailing a letter to their post office addresses last known to the commissioner. If, after 30 days of mailing the notice, the amount due remains unpaid, the commissioner shall bring an action to collect the amount due including, but not limited to, penalties, interest, and costs. It shall not be necessary to make the defaulting taxpayer a party to any action that may be brought against his surety or sureties.

APPENDIX QQ

O.C.G.A. § 48-2-55. Attachment and garnishment; levy.

(a) All taxes are a personal debt of the person required by this title to file the returns or to pay the taxes imposed by this title.

(b)(1) The commissioner or his authorized representative may attach the property of a delinquent taxpayer on any ground provided by Code Section 18-3-1 or on the ground that the taxpayer is liquidating his property in an effort to avoid payment of the tax.

(2) The commissioner or his authorized representative may use garnishment to collect any tax, fee, license, penalty, interest, or collection costs due the state which are imposed by this title or which the commissioner or the department is responsible for collecting under any other law. Garnishment may be issued by the commissioner or his authorized representative against any person whom he believes to be indebted to the defendant or who has property, money, or effects in his hands belonging to the defendant. The summons of garnishment shall be served by the commissioner or his authorized representative, shall be served at least 15 days before the sitting of the court to which the summons is made returnable, and shall be returned to either the superior court or the state court of the county in which the garnishee is served. The commissioner or his authorized representative shall enter on the execution the names of the persons garnished and shall return the execution to the appropriate court. All subsequent proceedings shall be the same as provided by law regarding garnishments in other cases when

judgment has been obtained or execution issued.

(c) In case of neglect or refusal by a taxpayer to pay any taxes, fees, licenses, penalties, interest, or collection costs due the state, the commissioner or his authorized representative may levy upon all property and rights to property belonging to the taxpayer, except such as are exempt by law, for the payment of the amount due, together with interest on the amount, any penalty for nonpayment, and such further amount as shall be sufficient for the fees, costs, and expenses of the levy. As used in this subsection, the term "property and rights to property" includes, but is not limited to, any account in or with a financial institution.

(d) The commissioner or his authorized representative may levy and conduct judicial sales in the manner provided by law for sales by sheriffs and constables. Levy, in the case of personal property, shall be advertised ten days before the date of sale. Advertisements of sales shall designate the time and place of the sale, shall give a reasonable description of the property to be sold, shall be posted in three public places in the county, and shall be inserted at least one time in the newspaper in which sheriff's sales in the county are advertised. The sale shall be conducted within the county in which the property levied on is situated and shall be held between the hours of 10:00 A.M. and 4:00 P.M. eastern standard time or eastern daylight time, whichever is applicable. In the event the levy is upon personal property, the sale shall be conducted within the county in which the property levied on is situated, except that if it appears to the commissioner that substantially higher bids may be obtained for

the property if the sale is held at a place outside such county, he may order that the sale be held in such other place. If the location of the sale is in a county other than the county in which the levy was made, notice of the sale as required by this Code section shall be made in both counties. In the event the levy is upon real property, the commissioner or his authorized representative, after making the levy, shall return the levy on the execution to the sheriff of the county in which the property is located. After the return, the sheriff shall proceed to advertise and sell the property as required by law.

APPENDIX RR

O.C.G.A. § 48-2-59. Appeals; payment of taxes admittedly owed; bond; costs.

(a) Except with respect to claims for refunds, either party may appeal from any order, ruling, or finding of the commissioner to the superior court of the county of the residence of the taxpayer, except that:

> (1) If the taxpayer is a public utility or nonresident, the appeal of either party shall be to the superior court of the county in which is located the taxpayer's principal place of doing business or in which the taxpayer's chief or highest corporate officer residing in this state maintains his office; or
>
> (2) If the taxpayer is a nonresident individual or a foreign corporation having no place of doing business and no officer or employee residing and maintaining his office in this state, the taxpayer shall have the right to appeal to the Superior Court of Fulton County or to the superior court of the county in which the commissioner in office at the time the action is filed resides.

(b) The appeal and necessary records shall be certified by the commissioner and shall be filed with the clerk of the superior court within 30 days from the date of decision by the commissioner. The procedure provided by law for applying for and granting appeals from the probate court to the superior court shall apply as far as suitable to the appeal authorized by this Code section, except that the appeal authorized by this Code section may be filed within 30 days from the date of decision by the commissioner.

(c) Before the superior court shall have jurisdiction to entertain an appeal filed by any aggrieved taxpayer, the taxpayer shall file with the clerk of the superior court a written statement whereby the taxpayer agrees to pay on the date or dates the taxes become due all taxes for which the taxpayer has admitted liability. Additionally, the taxpayer shall file with the clerk of the superior court within 30 days from the date of decision by the commissioner, except where the value of the appellant's title or interest in real property owned in this state is in excess of the amount of the tax in dispute, a surety bond or other security in an amount satisfactory to the clerk, conditioned to pay any tax over and above that for which the taxpayer has admitted liability and which is found to be due by a final judgment of the court, together with interest and costs. It shall be ground for dismissal of the appeal if the taxpayer fails to pay all taxes admittedly owed upon the due date or dates as provided by law.

(d) (1) If the final judgment of the court places upon the taxpayer any tax liability which has not already been paid and if the tax or any part of the tax has:

(A) Not become due on the date of the final judgment of the court, then the taxpayer shall pay the amount of the unpaid tax liability on the due date or dates as provided by law; or

(B) Already become due at the time of final judgment of the court, the taxpayer shall immediately pay the tax or as much of the tax as has already become due, with interest.

(2) In the event the final judgment of the court is adverse to the taxpayer, he shall pay the court costs regardless of whether the tax or any part of the tax has or has not become due at the time of the final judgment of the court.

APPENDIX SS

O.C.G.A. § 50-13-11. Declaratory rulings by agencies.

Each agency shall provide by rule for the filing and prompt disposition of petitions for declaratory rulings as to the applicability of any statutory provision or of any rule or order of the agency, provided that nothing herein shall limit or impair the right of an agency to seek the opinion of the Attorney General on any question of law connected with the duties of the agency pursuant to Code Section 45-15-3 or any other applicable statutory or constitutional provision. Rulings disposing of petitions have the same status as agency decisions or orders in contested cases.

APPENDIX TT

O.C.G.A. § 50-13-12. Department of Revenue to hold hearing when demanded by aggrieved taxpayer; election of remedies.

(a) The Department of Revenue shall hold a hearing upon written demand therefor by any taxpayer aggrieved by any act of the department in a matter involving his liability for taxes, or any failure of the department to act in such a matter if the failure is deemed an act under any provision of a tax statute administered by the department, or by any order of the department in such a matter other than an order on a hearing of which the taxpayer was given actual notice or at which the taxpayer appeared as a party.

(b) Any such demand for a hearing shall be made within 30 days after the act or failure to act causing the injury and shall specify in what respect the taxpayer is aggrieved and the grounds to be relied upon as a basis for the relief to be demanded at the hearing; and, unless postponed by mutual consent, the hearing shall be held within 30 days after receipt by the Department of Revenue of the demand therefor. The proceeding shall have the status of a contested case.

(c) Pending the hearing and the decision thereon the Department of Revenue may suspend or postpone the effective date of its previous action.

(d) This Code section is not intended to require that the aggrieved taxpayer must demand a hearing hereunder before pursuing judicial remedies which may be

available to him, but an aggrieved taxpayer who does demand a hearing under this Code section shall be deemed to have elected the remedies provided in this Code section and in Code Section 50-13-19 as his exclusive remedies.

APPENDIX UU

Department of Law
State of Georgia

(SEAL)
Michael J. Bowers
Attorney General

40 CAPITOL SQUARE SW
ATLANTA, GA 30334-1300

December 9, 1993

WRITER'S DIRECT DIAL
(404) 656-4585
FAX (404) 651-9148

Honorable Marcus E. Collins, Sr.
Commissioner
Georgia Department of Revenue
410 Trinity-Washington Building
Atlanta, GA 30334

Re: Tedder, *et al. v. Collins*, Civil Action No. 93-1-5530-28, Superior Court of Cobb County, Complaint for Declaratory Judgment.

Dear Commissioner Collins:

We have reviewed the Court's Order in the above case. We strongly recommend against any refunds at this time, unless the State is prepared also to pay refunds in *Reich* and *Beam*, which have a combined $160 million in potential claims. Payment of refunds in this case could seriously jeopardize our positions in the other pending refund cases.

Further, although I believe that the Court's Order is legally in error, in view of your decision to halt the collection of tax on casual sales of used Certificated Transportation Equipment, we recommend only filing a Motion for Clarification with the Court. The purpose of the Motion for Clarification would be to get the Court to

confine its ruling, invalidating Revenue Regulation § 560-12-1-07, entitled "Casual Sale" and in effect from July 1, 1992 through October 11, 1993, (the "Amended Casual Sale Regulation"), to the provisions of the Regulation that relate to used Certificated Transportation Equipment.

In its current form, the Court's Order may very well invalidate the Amended Casual Sale Regulation in its entirety. This could preclude efforts to collect tax on sales by taxpayers other than the class of taxpayers involved here. We understand from discussions with your staff that collection of taxes on casual sales of property other than used Certificated Transportation Equipment, such as sales of assets by businesses, provides a substantial revenue stream for the State. An order which is limited to the facts of this case, the sale of used Certificated Transportation Equipment, would preserve the other provisions of the Amended Casual Sale Regulation.

If the Court does not rule on the Motion for Clarification by the deadline for filing an appeal in the case, January 3, 1994, or should the Court issue an adverse ruling or deny the Motion beyond that time, then we recommend that the Court's Order be appealed. An appeal of the Court's Order would hold in abeyance any determination regarding refunds.

Please feel free to call me if you have any questions or comments.

Sincerely,

/s/ Michael J. Bowers
MICHAEL J. BOWERS
Attorney General

MJB/lbm

APPENDIX VV

THE ATLANTA CONSTITUTION

WEDNESDAY, DECEMBER 15, 1993

Miller says he'll refund $34 million from tax on used-vehicle sales

By Ben Smith III
and Ken Foskett
STAFF WRITERS

Thousands of Georgians who paid sales tax on cars, boats and planes they purchased in private sales between July 1992 and August 1993 will get full refunds, Gov. Zell Miller announced Tuesday.

In a move that could defuse a potential campaign issue but create thorny bureaucratic and legal problems for the state, Miller announced that he would refund about $34 million to Georgians who paid the casual sales tax that he imposed without legislative approval.

Miller gave no specifics on how to obtain the refunds.

"Today, the state is in solid financial shape and the Rainy Day Fund has more than $121 million," said Miller, in a prepared statement. "Under these circumstances, I am ordering the revenue commissioner to issue refunds in January to all who paid the casual sales tax."

Miller spokesman Rick Dent said that up to 200,000 Georgians will be entitled to refunds. No details were available on the amount of the average refund or whether the money would be repaid with interest.

Dent denied that Miller's action, coming three weeks before the opening of an election-year legislative session, was politically motivated.

"This should have some effect in limiting the [political] damage," said Robert Proctor, a lawyer who successfully challenged the tax in court.

The tax, which was imposed as part of an anti-recessionary package to fund construction projects, had prompted a class-action lawsuit and demands for refunds from political opponents.

Miller discontinued collection of the tax on Aug. 20.

But acting on the advice of Attorney General Michael J. Bowers, Miller initially refused to offer refunds, believing they were illegal.

Then 10 days ago, a Cobb Superior Court judge ruled that Miller acted illegally in imposing the tax in the first place. But Bowers continued to advise the governor against refunds, arguing that the action might pave the way for future court actions against the state.

No. 93-1140

FEB 11 1994
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1993

JAMES B. BEAM DISTILLING CO.,

Petitioner,

v.

STATE OF GEORGIA; ZELL MILLER, individually and as Governor of the State of Georgia; MARCUS E. COLLINS, individually and as Georgia State Revenue Commissioner; and CLAUDE L. VICKERS, individually and as Director of the Fiscal Division of the Department of Administrative Services,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of Georgia

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

DAVID A. RUNNION
Senior Assistant Attorney General
(Counsel of Record for Respondents)

MICHAEL J. BOWERS
Attorney General

DANIEL M. FORMBY
Senior Assistant Attorney General

Attorneys for Respondents

Georgia Department of Law
132 State Judicial Building
40 Capitol Square, S.W.
Atlanta, Georgia 30334-1300
(404) 656-3340

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

1. Whether a state procedural bar of lack of standing, or state reliance interests and equitable considerations preclude the refund of a liquor tax which had been ruled constitutional prior to payment, but which was later ruled invalid by the retroactive application of a new rule of federal law, where the tax was not challenged at the time of payment, the tax was collected in full by the claiming manufacturer from its ultimately liable wholesalers, and where the state expended the tax in good faith reliance for 45 years upon its validity?

2. Whether due process requires a state to refund a liquor tax validly imposed and voluntarily remitted, after a newly announced rule of constitutional law invalidating the tax is held to apply retroactively, where the state provided multiple predeprivation remedies by which the tax could have been challenged prior to payment and which were not pursued?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iv

OPINIONS BELOW 2

JURISDICTION 3

STATUTES AND OTHER PROVISIONS INVOLVED... 3

STATEMENT OF THE CASE 4

Response To Petitioner's Statement Of The Case.... 9

REASONS FOR DENYING THE WRIT 13

I. THE DECISION BELOW WAS BASED UPON AN ADEQUATE AND INDEPENDENT STATE GROUND 13

II. THE DECISION BELOW WAS CORRECTLY DECIDED 16

A. UNDER THIS COURT'S MANDATE FOR REMAND AND OTHER DECISIONS, THE STATE PROCEDURAL BAR, RELIANCE INTERESTS AND EQUITABLE CONSIDERATIONS PRECLUDE A REFUND TO PETITIONER IN THIS CASE 16

B. DUE PROCESS IS SATISFIED BY MULTIPLE PREDEPRIVATION REMEDIES WHICH PETITIONER FAILED TO AVAIL ITSELF OF PRIOR TO PAYMENT OF THE TAX 19

1. Georgia Provides Adequate Predeprivation Remedies 21

TABLE OF CONTENTS – Continued

Page

2. There Is No Merit To The "Duress" Argument 24

C. THERE IS NO MERIT TO PETITIONER'S OTHER ARGUMENTS..... 28

CONCLUSION 29

APPENDICES

Appendix 1 – O.C.G.A. § 3-2-13 1-1

Appendix 2 – O.C.G.A. § 3-2-14 2-1

Appendix 3 – O.C.G.A. § 3-2-35 3-1

Appendix 4 – O.C.G.A. § 3-4-152 4-1

Appendix 5 – O.C.G.A. § 9-4-10 5-1

Appendix 6 – O.C.G.A. § 9-11-15(a), (b), & (c) 6-1

Appendix 7 – O.C.G.A. § 48-3-1 7-1

Appendix 8 – O.C.G.A. § 50-13-10 8-1

Appendix 9 – O.C.G.A. § 50-13-13 9-1

Appendix 10 – O.C.G.A. § 50-13-19 10-1

Appendix 11 – O.C.G.A. § 50-13-20 11-1

Appendix 12 – Ga. Revenue Rule 560-1-1-.10..... 12-1

Appendix 13 – Ga. Revenue Rule 560-1-1-.11..... 13-1

Appendix 14 – Ga. Revenue Rule 560-1-1-.12..... 14-1

Appendix 15 – Ga. Revenue Rule 560-1-1-.13..... 15-1

Appendix 16 – Ga. Revenue Rule 560-1-1-.14..... 16-1

Appendix 17 – Ga. Revenue Rules Chp. 560-2-9... 17-1

TABLE OF AUTHORITIES

Page

CASES

Adams v. Smith, 415 F. Supp. 787 (N.D. Ga. 1976), *aff'd*, 568 F.2d 1232 (11th Cir. 1978) 22

Adickes v. S.H. Kress & Co., 398 U.S. 144 (1970) 13

American Trucking Ass'ns, Inc. v. Smith, 496 U.S. 167 (1990) 17

Atchison, Topeka & Sante Fe Ry. v. Lennen, 732 F.2d 1495 (10th Cir. 1984) 15

Atchison, Topeka & Sante Fe Ry. v. O'Connor, 223 U.S. 280 (1912) 27

Atlanta Americana Motor Hotel Corp. v. Undercofler, 222 Ga. 295, 149 S.E.2d 691 (1966) 14

Bacchus Imports, Ltd. v. Dias, 468 U.S. 263 (1984) 4, 5, 8, 11, 18, 28

Blackmon v. Alexander, 233 Ga. 832, 213 S.E.2d 842 (1975) 22

Blackmon v. Georgia Independent Oilmen's Ass'n, 129 Ga. App. 171, 198 S.E.2d 896 (1973) 14

Blackmon v. Golia, 231 Ga. 381, 202 S.E.2d 186 (1973) 21

Blackmon v. Premium Oil Stations, Inc., 129 Ga. App. 169, 198 S.E.2d 900 (1973) 14

Blackston v. Georgia Dep't of Natural Resources, 255 Ga. 15, 334 S.E.2d 679 (1985) 7

Brinkerhoff-Faris Trust & Savings Co. v. Hill, 281 U.S. 673 (1930) 27-28

Chevron Oil Co. v. Huson, 404 U.S. 97 (1971) ... 5, 16, 17

Cipriano v. City of Houma, 395 U.S. 701 (1969) 18

TABLE OF AUTHORITIES – Continued

Page

City Council of Augusta v. Mangelly, 243 Ga. 358, 254 S.E.2d 315 (1979) 21

City of Atlanta v. Spence, 242 Ga. 194, 249 S.E.2d 554 (1978) 22

City of Lithonia v. DeKalb County Bd. of Educ., 231 Ga. 150, 200 S.E.2d 698 (1973) 21

Clein v. Kaplan, 201 Ga. 396, 40 S.E.2d 133 (1946) 22

Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541 (1949) 27

Davis v. Michigan Dep't of Treasury, 489 U.S. 803 (1989) 11

Dekalb County v. Allstate Beer, Inc., 229 Ga. 483, 192 S.E.2d 342 (1972) 22

Department of Public Safety v. Foreman, 130 Ga. App. 71, 202 S.E.2d 196 (1973) 24

Edelman v. California, 344 U.S. 357 (1953) 16

Eimco BSP Services Co. v. Chilivis, 241 Ga. 263, 244 S.E.2d 829 (1978) 14

Flint River Mills v. Henry, 234 Ga. 385, 216 S.E.2d 895 (1975) 24

Flowers v. Georgia Real Estate Comm'n, 141 Ga. App. 105, 232 S.E.2d 586 (1977) 24

Ford Motor Co. v. Coleman, 402 F. Supp. 475 (D. D.C. 1975), *aff'd*, 425 U.S. 927 (1976) 26

TABLE OF AUTHORITIES – Continued

Page

Georgia Real Estate Comm'n v. Horne, 141 Ga. App. 226, 233 S.E.2d 16 (1977) 24

Gravely v. Bacon, 263 Ga. 203, 429 S.E.2d 663 (1993) 22

Harper v. Virginia Dep't of Taxation, 509 U.S. ___, 113 S.Ct. 2510 (1993) 11, 14, 16, 17, 19, 20

Harris v. Entertainment Systems, Inc., 259 Ga. 701, 386 S.E.2d 140 (1989) 26

Hawes v. Bigbie, 123 Ga. App. 122, 179 S.E.2d 660 (1970) 14

Henry v. Mississippi, 379 U.S. 443 (1965) 14, 15, 16

Herb v. Pitcairn, 324 U.S. 117 (1945) 16

Heublein, Inc. v. State, 256 Ga. 578, 351 S.E.2d 190 (1987), *appeal dismissed*, 483 U.S. 1013 (1987) 4, 21, 22, 29

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James B. Beam Distilling Co. v. Georgia, 501 U.S. ___, 111 S.Ct. 2439 (1991) ("*Beam* (U.S.)") ..... *passim*

James B. Beam Distilling Co. v. Georgia, 263 Ga. 609, 437 S.E.2d 782 (1993) ("*Beam* (Ga. II)") ..... *passim*

Lemon v. Kurtzman, 411 U.S. 192 (1973) 5, 17

Lit v. United States, 18 F. Supp. 435 (E.D. Pa. 1937) 15

McDonough Construction Co. v. McLendon Electric Co., 242 Ga. 510, 250 S.E.2d 424 (1978) 6

McGoldrick v. Compagnie Generale Transatlantique, 309 U.S. 430 (1940) 18

McKesson Corp. v. Florida Alcoholic Beverages & Tobacco Div., 496 U.S. 18 (1990) ..... *passim*

TABLE OF AUTHORITIES – Continued

Page

McMillen v. Anderson, 95 U.S. 37 (1877) 27

Michigan v. Long, 463 U.S. 1032 (1983) 14

Newsome v. Brown, 252 Ga. 421, 314 S.E.2d 225 (1984) 23

Noble v. Joint City-County Bd. of Tax Assessors of Fulton County, 672 F.2d 872 (11th Cir. 1982) 22

Owens v. Okure, 488 U.S. 235 (1989) 9

Ownbey v. Morgan, 256 U.S. 94 (1921) 27

Parrish v. Employees' Retirement System, 260 Ga. 613, 398 S.E.2d 353 (1990), *cert. denied*, 111 S.Ct. 2016 (1991) 21

Reich v. Collins, 262 Ga. 625, 422 S.E.2d 846 (1992) ("*Reich I*"), *vacated and remanded*, 61 U.S.L.W. 3867 (June 28, 1993) 11, 12, 27, 29

Reich v. Collins, 263 Ga. 602, 437 S.E.2d 320 (1993) ("*Reich II*") 11, 12, 29

Reisman v. Caplin, 375 U.S. 440 (1964) 26

Richmond County Property Owner's Ass'n v. Augusta-Richmond County Coliseum Authority, 233 Ga. 94, 210 S.E.2d 172 (1974) 21

Robbins v. City of Rome, 230 Ga. 901, 199 S.E.2d 802 (1973) 21-22

Rogers v. DeKalb County Bd. of Tax Assessors, 247 Ga. 726, 279 S.E.2d 223 (1981) 21

TABLE OF AUTHORITIES – Continued

Page

Scott v. State, 187 Ga. 702, 2 S.E.2d 65 (1939), *overruled on other grounds, Blackston v. Georgia Dep't of Natural Resources*, 255 Ga. 15, 334 S.E.2d 679 (1985) 7, 18

Sharp & Dohme, Inc. v. United States, 144 F.2d 456 (3d Cir. 1944) 15

State Board of Equalization of California v. Young's Market Co., 299 U.S. 59 (1936) 7-8, 18

State v. Private Truck Council of America, Inc., 258 Ga. 531, 371 S.E.2d 378 (1988) 21

Travel Industries of Kansas, Inc. v. United States, 425 F.2d 1297 (10th Cir. 1970) 15

United States v. Childs, 266 U.S. 304 (1924) 26

United States v. Estate of Donnelly, 397 U.S. 286 (1969) 5, 17-18

United States v. Jefferson Electric Mfg. Co., 291 U.S. 386 (1934) 14-15

Wages v. Michelin Tire Corp., 233 Ga. 712, 214 S.E.2d 349 (1975), *aff'd*, 423 U.S. 276 (1976) 21

Ward v. Board of County Comm'rs, 253 U.S. 17 (1920) 28

STATUTES

28 U.S.C. § 1257 3

42 U.S.C. § 1983 ..... 8, 9

TABLE OF AUTHORITIES – Continued

Page

F.S.A. § 72.011 28

F.S.A. Chapter 564 28

F.S.A. Chapter 565 28

O.C.G.A. Title 3 25

O.C.G.A. § 3-2-3 26

O.C.G.A. § 3-2-11 ..... 9, 23, 26

O.C.G.A. § 3-2-12 26

O.C.G.A. § 3-2-13 ..... 3, 10

O.C.G.A. § 3-2-14 ..... 3, 10

O.C.G.A. § 3-2-33 25

O.C.G.A. § 3-2-35 ..... 3, 26

O.C.G.A. § 3-2-36 25

O.C.G.A. § 3-3-27 25

O.C.G.A. § 3-4-60 (pre-1985 version) 4, 7

O.C.G.A. § 3-4-61 (1993 Supp.; version not applicable to the instant case) 6

O.C.G.A. § 3-4-61(a)(2) (pre-1992 version, which is applicable to the instant case) 6, 9, 21, 25

O.C.G.A. § 3-4-152 ..... 3, 7

O.C.G.A. § 9-3-33 9

O.C.G.A. § 9-4-1 22

O.C.G.A. § 9-4-2 22

O.C.G.A. § 9-4-3 22

TABLE OF AUTHORITIES – Continued

Page

O.C.G.A. § 9-4-10 ..... 3, 22

O.C.G.A. § 9-11-15(a), (b) & (c) 3, 6

O.C.G.A. § 48-2-35 ..... *passim*

O.C.G.A. § 48-2-44 26

O.C.G.A. § 48-2-54 24

O.C.G.A. § 48-2-59 27

O.C.G.A. § 48-3-1 ..... 3, 24, 27

O.C.G.A. § 50-13-10 ..... 3, 24

O.C.G.A. § 50-13-11 24

O.C.G.A. § 50-13-12 23

O.C.G.A. § 50-13-13 ..... 3, 23, 24

O.C.G.A. § 50-13-19 ..... 3, 24

O.C.G.A. § 50-13-20 ..... 3, 24

MISCELLANEOUS

U.S. Const., Twenty-first Amendment 7

U.S. Sup. Ct. Rule 24.6 9

Ga. Revenue Rule 560-2-3-.09 25

Ga. Revenue Rules 560-1-1-.10 through 560-1-1-.14 ..3, 24

Ga. Revenue Rules Chp. 560-2-9 ..... 3, 26

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October Term, 1993

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Petitioner,

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STATE OF GEORGIA; ZELL MILLER, individually and as Governor of the State of Georgia; MARCUS E. COLLINS, individually and as Georgia State Revenue Commissioner; and CLAUDE L. VICKERS, individually and as Director of the Fiscal Division of the Department of Administrative Services,

Respondents.[1]

On Petition For Writ Of Certiorari To The Supreme Court Of Georgia

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

The Petition for Writ of Certiorari to the Supreme Court of Georgia should be denied, because on remand the Georgia courts properly followed the mandate of this

[1] There was dispute below over whether, after substituting Georgia's current Governor, Zell Miller, Petitioner/Plaintiff could reinject Georgia's former Governor, Joe Frank Harris, into the case. In its final orders, the trial court excluded the former governor from the style. See Appendices B & C to the petition. Respondents thus use the trial court's style of the case.

Court and properly applied this Court's other decisions. The claim for refund of Petitioner James B. Beam Distilling Co. ("Beam") is barred by Petitioner's lack of standing under Georgia's refund statute and is precluded by the State's good faith reliance for 45 years upon the constitutionality of its liquor tax under the decisions of this Court, and due to the inequities of a refund in this case. Further, since Georgia provides ample predeprivation remedies which Petitioner did not pursue, due process is satisfied. Thus, Respondents (also referred to collectively herein as "the State") respectfully submit that the petition should be denied.

OPINIONS BELOW

The Georgia Supreme Court's opinion (sometimes referred to as "*Beam* (Ga. II)") is reported at 263 Ga. 609, 437 S.E.2d 782 (1993) (Appendix A to petition).[2] The unreported decisions of the Superior Court of Fulton County on remand are set out in Appendices B and C. Opinions from the first phase of this case are *James B. Beam Distilling Co. v. Georgia*, 501 U.S. ___, 111 S. Ct. 2439 (1991) (Appendix D) (sometimes referred to as "*Beam* (U.S.)"); *James B. Beam Distilling Co. v. Georgia*, 259 Ga. 363, 382 S.E.2d 95 (1989) (Appendix E) (sometimes referred to as "*Beam* (Ga. I)"); and the initial, unreported decision of the Superior Court of Fulton County (Appendix F).

[2] Lettered Appendices (*e.g.*, A, B, etc.) are attached to the Petition for Writ of Certiorari. Numbered Appendices (*e.g.*, 1, 2, etc.) are attached to this Brief in Opposition.

JURISDICTION

Although Petitioner predicates jurisdiction upon 28 U.S.C. § 1257, review is precluded by an adequate and independent state ground for the decision below. The cause of action involved is a suit for refund under O.C.G.A. § 48-2-35 (Appendix MM), a refund provision in Georgia's Public Revenue Code. The Court's mandate for remand in this case expressly authorized consideration of any applicable procedural bars. The facts developed on remand and the prior, settled law of the State of Georgia establish that Beam lacks standing to obtain a refund under § 48-2-35 of taxes which were rebated to Beam by the ultimately liable wholesalers.

STATUTES AND OTHER PROVISIONS INVOLVED

In addition to the constitutional provisions and the Georgia statutes appended to the petition, the following Georgia statutes and rules are also involved and are appended to this Brief in Opposition: O.C.G.A. §§ 3-2-13 (Appendix 1), 3-2-14 (Appendix 2), 3-2-35(d) & (e) (Appendix 3), 3-4-152 (Appendix 4), 9-4-10 (Appendix 5), 9-11-15(a), (b) & (c) (Appendix 6), 48-3-1 (Appendix 7), 50-13-10 (Appendix 8), 50-13-13 (Appendix 9), 50-13-19 (Appendix 10), 50-13-20 (Appendix 11); Georgia Revenue Rules 560-1-1-.10 (Appendix 12), 560-1-1-.11 (Appendix 13), 560-1-1-.12 (Appendix 14), 560-1-1-.13 (Appendix 15), 560-1-1-.14 (Appendix 16), and Chp. 560-2-9 (Appendix 17).

STATEMENT OF THE CASE

Petitioner brought this state court action for a refund under O.C.G.A. § 48-2-35 (Appendix MM), for liquor taxes paid in 1982-84 under Georgia's liquor tax statute which had been enacted in 1938. *See* O.C.G.A. § 3-4-60 (pre-1985 version) (Appendix EE). Beam challenged the tax under *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984).[3] The trial court held that the 1938 tax unconstitutionally discriminated in favor of distilled spirits manufactured from Georgia-grown products, but applied its ruling prospectively, and the Georgia Supreme Court affirmed. *Beam* (Ga. I), 259 Ga. 363, 382 S.E.2d 95 (1989).

This Court reversed the prospectivity ruling and remanded on all remedial issues. *Beam* (U.S.), 111 S.Ct. 2439 (1991). The Court expressly preserved the State's right to raise procedural bars, reliance interests, and equitable considerations on remand:

> The grounds for our decision today are narrow. They are confined entirely to an issue of choice of law: when the Court has applied a rule of law to the litigants in one case it must do so with respect to all others *not barred by procedural requirements* or res judicata. We do not speculate as to the bounds or propriety of pure prospectivity.

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[3] Georgia's 1938 tax statute was amended in 1985 after this Court found a similar Hawaii statute to be violative of the Commerce Clause in *Bacchus*. A Commerce Clause challenge to the 1985 Georgia statute was rejected in *Heublein, Inc. v. State*, 256 Ga. 578, 351 S.E.2d 190 (1987), *appeal dismissed*, 483 U.S. 1013 (1987).

> Nor do we speculate about the remedy that may be appropriate in this case; remedial issues were neither considered below nor argued to this Court, save for an effort by petitioner to buttress its claim by reference to our decision last Term in *McKesson*. As we have observed repeatedly, federal "issues of remedy . . . may well be intertwined with, or their consideration obviated by, issues of state law." *Bacchus*, ... Nothing we say here deprives respondent [State of Georgia] of [its] opportunity to raise *procedural bars to recovery under state law or demonstrate reliance interests* entitled to consideration in determining the nature of the remedy that must be provided, a matter with which *McKesson* did not deal. See *Estate of Donnelly*, 397 U.S., at 296 . . . ; cf. *Lemon*, 411 U.S., at 203. . . .
>
> The judgment is reversed, and the case is remanded for further proceedings.

111 S.Ct. at 2448 (emphasis added).[4]

The Georgia Supreme Court, in turn, remanded the case to the trial court "for further proceedings consistent with the decision of the United States Supreme Court."

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[4] The role of procedural bars, reliance interests, and equitable considerations in the remedial context of a case like this were also mentioned elsewhere in the various opinions written in *Beam* (U.S.), *e.g.*, 111 S.Ct. at 2443 (Souter, J.) (noting that even full retroactivity is limited by res judicata and procedural barriers such as statutes of limitations); 111 S.Ct. at 2446-47 (Souter, J.) (retroactivity in civil cases is limited "by state procedural requirements"); 111 S.Ct. at 2450 (Blackmun, J., concurring) (rule of retroactivity adopted today "is not the remedial equity that the dissent seems to [discuss]"); 111 S.Ct. 2451-56 (O'Connor, J., dissenting) (discussing equitable considerations and the case of *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971)).

Appendix B, p. B4. The parties engaged in discovery, and Beam amended its complaint and the State amended its answer.[5] R. (S93A1217) 1132, 1149, 9, 76. The additional evidence presented on remand established the following facts.

During 1982-84, Georgia's liquor tax was administered through the sale of stamps by the Revenue Department.[6] While either a wholesaler or a manufacturer could purchase or affix the stamps prior to the product being shipped to a retailer by the wholesaler, the wholesaler was ultimately liable for the tax and would reimburse the manufacturer for the tax when the manufacturer had purchased the stamps first. *See* R. (S93A1217) 118-19.[7]

Beam manufactures distilled spirits outside Georgia and sells them to its wholesalers in Georgia under Georgia's three-tier system.[8] During 1982-84, when Beam purchased liquor stamps the rate for its products was $1.00

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[5] The defenses raised in the State's original Answer and Amended Answer were properly before the court both under this Court's mandate and under Georgia law. *See* O.C.G.A. § 9-11-15(a), (b) & (c) (Appendix 6); *McDonough Construction Co. v. McLendon Electric Co.*, 242 Ga. 510, 515, 250 S.E.2d 424, 429 (1978).

[6] Effective February 1, 1993, stamps were eliminated, and the tax is now collected exclusively from the wholesalers through a reporting system. O.C.G.A. § 3-4-61 (1993 Supp.).

[7] O.C.G.A. § 3-4-61(a)(2) (pre-1992 version, which is applicable in the instant case) (Appendix FF) provided: "Before shipment or delivery to any retailer, every manufacturer or wholesaler shall affix or cause to be affixed to each bottle or container of distilled spirits a stamp indicating the payment of the proper amount of tax".

[8] The three tiers are manufacturer, wholesaler and retailer. The tiers must remain distinct, and only wholesalers can ship to

per liter.[9] Beam seeks a refund of the full $1.00 per liter,[10] even though all claimed amounts were collected by Beam from its ultimately liable Georgia wholesalers, separately from the price of the distilled spirits. R. (S93A1217) 120, 130-241, 279-80; T. 9. All pending refund claims awaiting resolution of the instant case for pre-1985 taxes equal $31,700,000, and with claimed interest the total is $60,000,000. R. (S93A1217) 123.

The taxes in question were paid to the State without challenge to their validity and without actual threat of collection, criminal prosecution, or other sanction. R. (S93A1217) 120-22. The State expended these taxes for public works, programs and services, without reserve or contingency and in good faith reliance upon their validity. R. (S93A1217) 259. In particular, the State relied upon the upholding of the tax against a Commerce Clause challenge in *Scott v. State*, 187 Ga. 702, 2 S.E.2d 65 (1939),[11] as well as upon the Twenty-first Amendment to the United States Constitution and decisions of this Court such as *State Bd. of Equalization of California v. Young's*

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retailers. Manufacturers are granted exclusive sales territories for their products, through their designation of exclusive wholesale distributors. *See* O.C.G.A. § 3-4-152 (Appendix 4).

[9] The tax rate for distilled spirits manufactured from Georgia-grown products during the same period was $.50 per liter. O.C.G.A. § 3-4-60 (pre-1985 version) (Appendix EE).

[10] However, as noted in *McKesson Corp. v. Florida Alcoholic Beverages & Tobacco Div.*, 496 U.S. 18, 49 n. 33 (1990), the federal constitution does not contemplate a refund of more than the discriminatory portion of such a tax.

[11] Overruled on other grounds in *Blackston v. Georgia Dep't of Natural Resources*, 255 Ga. 15, 334 S.E. 2d 679 (1985).

Market Co., 299 U.S. 59 (1936). R. (S93A1217) 250. Georgia's liquor industry also considered the tax constitutional until *Bacchus*. *Id.*

The facts adduced on remand established that Georgia and its public programs and citizens would suffer if the State were now required to refund these taxes, R. (S93A1217) 261-63, 266, 273-74, and that when Beam purchased liquor stamps in 1982-84 it did not avail itself of any of the multiple predeprivation remedies that were available to challenge Georgia's liquor laws, R. (S93A1217) 122, 252-53.

On cross-motions for summary judgment, the trial court entered judgment for the State on several distinct grounds, including the procedural bar under § 48-2-35 (Appendix MM) that a party who remits a tax to the State does not have standing to recover the tax if the party has been reimbursed for the tax by its purchaser; based upon State reliance interests and equitable considerations; and due to the existence of predeprivation remedies which were found to satisfy due process. Trial court order, Appendix B, pp. B8-B12.[12] On appeal, the Georgia Supreme Court affirmed on the ground of Beam's lack of standing to obtain a refund under § 48-2-35, and due to the existence of multiple state predeprivation remedies

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[12] After final decision by the trial court on remand, Beam advanced a claim under 42 U.S.C. § 1983 and directly under the United States Constitution for a refund; and the trial court rejected those claims, which were essentially based upon the same due process argument previously made by Beam. R. (S93A1218) 6; App. C.

which were found to satisfy due process. *Beam* (Ga. II), Appendix A.[13]

Response To Petitioner's Statement Of The Case

Petitioner's Statement of the Case is argumentative and contains misstatements.[14]

Beam mischaracterizes Georgia's alcohol system during 1982-84. As the Georgia Supreme Court confirmed in its decision below, liability for the distilled spirits tax was ultimately imposed upon the wholesaler, whatever the arrangement settled upon by the manufacturer and wholesaler for actually purchasing and affixing the tax stamps before the wholesaler's shipment to the retailer. *See Beam* (Ga. II), Appendix A, pp. A3-A4; O.C.G.A. § 3-4-61(a)(2) (Appendix FF).[15] Often, manufacturers purchased and affixed stamps prior to shipment to the Georgia wholesaler, but in such cases the manufacturer was, in very real effect, the State's collection agent in collecting the tax from the ultimately liable wholesaler. Once the

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[13] The court did not reach Beam's 42 U.S.C. § 1983 related claims, which the State argued were barred by the statute of limitations and for other reasons. R. (S93A1218) Appellees' Brief. *See, e.g., Owens v. Okure*, 488 U.S. 235, 236 (1989); O.C.G.A. § 9-3-33 (two year general personal injury statute of limitations).

[14] The negative remarks at pp. 4-5 of the petition regarding the courts and the other parties below are not only incorrect, but particularly inappropriate. *See generally* U.S. Sup. Ct. Rule 24.6 ("A brief must be . . . free from . . . scandalous matter"). The Georgia courts and Respondents have at all times followed this Court's mandate and guidelines for remand.

[15] *See also* O.C.G.A. § 3-2-11(2) (App. U) (further indicating the liability of the wholesaler and of the importer).

manufacturer so collected the tax, the wholesaler became the real party in interest for this claim for refund. The price of the alcohol product to the wholesaler did not change, and the wholesaler did not pay the tax to Beam to acquire the goods, but to satisfy its own tax liability.

Beam is also incorrect in asserting that Respondents and "everyone involved in the case" agreed that § 48-2-35 "was the remedy available to the Petitioner."[16] During the first phase of this case, what everyone focused upon was obtaining a resolution on the merits of the constitutional challenge, and, as this Court noted in *Beam* (U.S.), 111 S.Ct. at 2448, "remedial issues were neither considered below nor argued to this Court." It was only after a ruling of retroactivity for the federal rule of law that remedial issues became relevant, and Beam is incorrect in implying that Respondents admitted that the refund remedy contended for by Beam would ever be proper in this case. In fact, during oral argument before this Court,

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[16] Petition, p. 4. Quite to the contrary, the State argued below that the more specific credit/refund provisions in the Alcoholic Beverages Code, O.C.G.A. §§ 3-2-13 (App. 1) and 3-2-14 (App. 2), were either the governing remedial provisions or, at the very least, must be read in conjunction with the general refund statute contained in the Public Revenue Code, O.C.G.A. § 48-2-35. R. (S93A1217) 329. That argument was not reached by the courts below. *E.g.*, trial court order, App. B, p. B12 n. 4.

Respondents expressly pointed out that there had not yet been a decision on that issue.[17]

Petitioner mischaracterizes the decisions of the Georgia courts and ignores the "standing" decisions under § 48-2-35 which were extant long before *Bacchus*. For example, in *Reich*,[18] a federal retiree sought a refund of

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[17] Transcript of Oral Argument (October 30, 1990), pp. 24-25:

> "Q. Do we assume that Georgia would provide a refund here if we agree with the petitioner on the retroactivity of *Bacchus*?
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> "Ms. Baker [Counsel for the State]: I don't think that we would agree that –
>
> "Q. Or has that been decided?
>
> "Ms. Baker: That issue has not been addressed by any court so far in the State of Georgia. And that issue, I think, would be open to be decided on a remand of this case, not inconsistent with the principles announced in the *McKesson* case. . . ."

Ms. Baker went on to point out, *inter alia*, the availability of injunctive relief in Georgia for challenges to unconstitutional tax statutes and to comment that reliance interests and equitable considerations were important to a resolution of the refund issue. *Id.* at 26-27, 29-30.

[18] The *Reich* cases involved Georgia income taxation of federal retirees in light of *Davis v. Michigan Dep't of Treasury*, 489 U.S. 803 (1989) and, more recently, in light of *Harper v. Virginia Dep't of Taxation*, 509 U.S. ___, 113 S.Ct. 2510 (1993). In *Reich v. Collins*, 262 Ga. 625, 422 S.E.2d 846 (1992) ("*Reich I*"), *vacated and remanded*, 61 U.S.L.W. 3867 (June 28, 1993), the court held Georgia's tax unconstitutional under *Davis* and retroactively so under *Beam* (U.S.), but concluded that no refund was due as a matter of state law. In *Reich v. Collins*, 263 Ga. 602, 437 S.E.2d 320 (1993) ("*Reich II*"), the court ruled that the taxpayer's waiver of adequate predeprivation remedies under Georgia law negated a due process argument for a refund.

Georgia income taxes under § 48-2-35, raising in *Reich II* due process arguments roughly similar to Petitioner's due process arguments in the instant case. Since *Reich II* is pending before this Court on petition for writ of certiorari, Petitioner in the instant case appears to be making a thinly veiled attempt to support the *Reich* petition and to give the impression that that case and the instant one are inextricably interdependent. Even a cursory reading of the decision below in the instant case shows that the two cases have important differences and that the *Reich* decisions are essentially irrelevant to the instant case. In *Beam* (Ga. II) the Georgia Supreme Court assumed *arguendo* that Beam's cause of action under § 48-2-35 could lie, as Beam vigorously asserted, but ruled, under clearly established Georgia law pertaining to that Code section and on the undisputed facts of this case, that Beam lacked standing to obtain a refund of taxes which it had collected from its ultimately liable wholesalers. Petitioner's usage of the *Reich* decisions in its petition appears designed to confuse the Georgia law and the ruling in *Beam* (Ga. II), in order to set up Petitioner's later, incorrect argument that Georgia provides no "clear" remedy.

Petitioner's final description, at pp. 8-10 of the petition, of the decision below is convoluted, with Petitioner at one point quoting its own inaccurate paraphrase of the court's holding. There is no ambiguity in the decision below: the court concluded that under established state law applicable to refund actions under § 48-2-35, Beam lacked standing to obtain a refund of taxes which it collected, as taxes, from its dually and ultimately liable wholesalers, and that Beam's failure to avail itself of

adequate predeprivation remedies prior to payment of the taxes vitiated Beam's due process argument.[19]

Petitioner's (mistaken) reliance upon matters outside the record is inappropriate. *See, e.g., Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157-58 n.16 (1970). The Georgia casual sales tax litigation referred to at page 11 of the petition is also irrelevant to the legal issues presented by the petition.[20]

REASONS FOR DENYING THE WRIT

I. THE DECISION BELOW WAS BASED UPON AN ADEQUATE AND INDEPENDENT STATE GROUND.

"It is, of course, a familiar principle that this Court will decline to review state court judgments which rest on

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[19] The decision below in *Beam* (Ga. II) was unanimous as to Beam's lack of standing, and two justices dissented on the due process issue. App. A.

[20] The sales tax case of *Tedder v. Collins*, Cobb Superior Court, State of Georgia, Civil Action No. 93-1-5530-28 (1993) was a declaratory judgment action to challenge the promulgation of an administrative regulation concerning Georgia's taxation of "casual sales". That case is merely another example of how Georgia's predeprivation remedies, including declaratory judgment and injunctive relief, provide a clear, prompt, and adequate procedure to challenge the validity of a tax and to seek an escrow account or other appropriate equitable relief. Since the facts and the legal issues in that case are different from the instant case, to the extent Beam may attempt to imply an equal protection problem, it is both non-existent and not present as an issue in the instant case.

independent and adequate state grounds, even where those judgments also decide federal questions." *Henry v. Mississippi*, 379 U.S. 443, 446 (1965). *See also Michigan v. Long*, 463 U.S. 1032, 1038 n.4 (1983).

The instant case was remanded by this Court for a consideration of remedial issues, including state procedural bars. *Beam* (U.S.), 111 S.Ct. at 2448. *See also id.* at 2442 ("the remedial inquiry is one governed by state law"). *Cf. Harper v. Virginia Dep't of Taxation*, 509 U.S. ___, 113 S.Ct. 2510, 2520 (1993) (leaving to state courts the remedial questions of state law).

The state ground in the decision below is clear from the face of the opinion, *i.e.*, that Beam lacks standing under O.C.G.A. § 48-2-35 to obtain a refund of taxes which its wholesalers paid to Beam to satisfy their own tax liability. The ruling not only has fair and substantial support under Georgia law, but the exclusive and well-established line of authority on point under § 48-2-35 makes the standing requirement clear. *See Eimco BSP Services Co. v. Chilivis*, 241 Ga. 263, 268, 244 S.E.2d 829 (1978); *Blackmon v. Georgia Independent Oilmen's Ass'n*, 129 Ga. App. 171, 174, 198 S.E.2d 896, 900 (1973); *Blackmon v. Premium Oil Stations, Inc.*, 129 Ga. App. 169, 170, 198 S.E.2d 900, 902 (1973). *See also Atlanta Americana Motor Hotel Corp. v. Undercofler*, 222 Ga. 295, 149 S.E.2d 691 (1966).[21] While the prior Georgia cases involved sales

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[21] This Georgia rule is similar to the standing rule under federal tax refund statutes, upon which § 48-2-35 was modeled. *See Hawes v. Bigbie*, 123 Ga. App. 122, 123, 179 S.E.2d 660, 661-62 (1970) and decisions under federal refund statutes, *e.g.*, *United States v. Jefferson Electric Mfg. Co.*, 291 U.S. 386, 400, 402-03 (1934)

taxes (imposing dual liability upon sellers and purchasers of tangible personal property), they establish a clear rule under § 48-2-35 and which is readily seen to apply to the liquor taxes collected by Beam from its wholesalers in the instant case. *See Beam* (Ga.II), Appendix A, pp. A3-A4.

That the standing bar may be deemed procedural in the instant case does not preclude its adequacy, *see Henry v. Mississippi*, 379 U.S. at 447, because the procedural bar serves legitimate state interests, including protection of the public fisc against claims which would result, in effect, in unjust enrichment. The standing requirement does not preclude a recovery by a seller for taxes absorbed by the seller, but only for taxes reimbursed to

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("We cannot assent to the view that a court may give a judgment awarding the taxpayer a refund without inquiring whether he has borne the burden of the tax or has reimbursed himself by collecting it from the purchaser," since suits for refund proceed on equitable principles); *Travel Industries of Kansas, Inc. v. United States*, 425 F.2d 1297, 1300 (10th Cir. 1970) (stating that taxpayer's argument that statutory tax refund suits do not involve equitable considerations "has no authoritative support of which we are aware," and refusing a refund which would be a windfall to plaintiff); *Sharp & Dohme, Inc. v. United States*, 144 F.2d 456, 458-59 (3d Cir. 1944) (common law rule is that plaintiff who collected the taxes from another and did not bear the burden of the taxes lacks standing to maintain an action for refund); *Lit v. United States*, 18 F. Supp. 435, 439 (E.D. Pa. 1937) (refund action is governed by equitable principles). *See also Atchison, Topeka & Sante Fe Ry. v. Lennen*, 732 F.2d 1495, 1506-07 (10th Cir. 1984) (denying on equitable grounds a refund under state law where the taxes were paid without protest and the government had already expended the revenues).

the seller by his ultimately liable purchaser, thus preventing a double recovery of the taxes *qua* taxes.[22]

II. THE DECISION BELOW WAS CORRECTLY DECIDED.

A. UNDER THIS COURT'S MANDATE FOR REMAND AND OTHER DECISIONS, THE STATE PROCEDURAL BAR, RELIANCE INTERESTS AND EQUITABLE CONSIDERATIONS PRECLUDE A REFUND TO PETITIONER IN THIS CASE.

In *Beam* (U.S.), 111 S.Ct. 2439, and *Harper*, 113 S.Ct. 2510, the Court shifted from the equitable balancing approach embodied in *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971) to a general rule of retroactivity for decisions which make new announcements of federal law. In light of the departure from *Chevron Oil's* approach to determining the applicable rule of law for controversies arising on facts predating the law-changing decision, state reliance interests, equitable considerations, and procedural bars are now appropriately, and importantly, relevant to questions of remedy and actual relief. This approach was

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[22] By analogy to the waiver doctrine, *see Henry v. Mississippi*, 379 U.S. at 448 n.3, it is also relevant in this context that Beam waived its opportunities to contest the tax prior to payment. Indeed, this Court has held that there is an adequate state ground where plaintiff chose the wrong remedy under local law. *Edelman v. California*, 344 U.S. 357, 361-62 (1953) (state provided another, proper remedy to test the constitutionality of a statute).

See also Herb v. Pitcairn, 324 U.S. 117, 125-26 (1945) (if the same judgment would be rendered by the state court after a correction of its views of federal law, this Court's review would be an advisory opinion).

established and mandated for the instant case by the Court's decision of June 20, 1991. *See Beam* (U.S.), 111 S.Ct. at 2448 (individual equities, procedural requirements and procedural bars, as well as reliance interests, may properly be considered in resolving remedial issues on remand).

While this issue has not been squarely decided for the general case and was apparently reserved in *Harper*, decisions of the Court other than *Beam* (U.S.) strongly indicate that state procedural bars, reliance interests, and equitable considerations must be taken into account in determining whether any actual relief in the form of a refund of taxes held retroactively unconstitutional is to be afforded a particular claimant.[23]

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[23] *See Harper*, 113 S.Ct. 2510, 2516 n.9, 2522 n.1, 2525-26, 2536-38 (wherein four justices expressly stated that equitable considerations are relevant to the remedial inquiry and a fifth indicated that procedural defaults may occur in this context); *American Trucking Ass'ns, Inc. v. Smith*, 496 U.S. 167, 219-20, 223 (1990) (wherein the plurality of four justices applied the equitable balancing test of *Chevron Oil* and the four dissenting justices considered *Chevron Oil* and the cases upon which it was based to be remedy cases in which consideration of reliance interests could be appropriate); *Lemon v. Kurtzman*, 411 U.S. 192, 198-99, 203, 207-09 (1973) (deciding state remedial issues on the basis of equitable reliance interests of the state as to the validity of the state statute during the period before it had been declared unconstitutional, and noting that state officials and those with whom they deal are entitled to rely on a presumptively valid state statute); *United States v. Estate of Donnelly*, 397 U.S. 286, 296-97 (1969) (Harlan, J., concurring, indicating that reliance interests and other equitable considerations should be taken into account in the determination of what "relief" is appropriate in any given case and stating: "There are, of course, circumstances when a change in the law will jeopardize an edifice

Application of these three factors in the remedial context of the instant case is a sound and appropriate rule. A refund to Petitioner is not warranted where the claimant lacks standing (as discussed in the preceding section of this Brief) and where the State's reliance interests and equitable considerations are superior.[24]

The instant case involves Georgia's pre-*Bacchus* tax statute, the validity of which had been relied upon by the State, and by the alcohol industry doing business in Georgia, since its upholding in 1939. R.(S93A1217) 250. Not only was the statute presumptively valid, it had been expressly upheld under the Commerce Clause, based upon this Court's *Young's Market* line of decisions. *Scott v. State*, 187 Ga. 702, 2 S.E.2d 65 (1939). Neither Beam nor anyone else challenged the validity of the tax prior to making the tax payments in question. R.(S93A1217) 122. Beam has fully recouped the taxes involved in its refund

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which was reasonably constructed on the foundation of prevailing legal doctrine. Thus, it may be that the law of remedies would permit rescission, for example, but not an award of damages to a party who finds himself able to avoid a once-valid contract under new notions of public policy"); *Cipriano v. City of Houma*, 395 U.S. 701, 706 (1969).

[24] The trial court based its denial of a refund upon the State's reliance interests and equitable considerations, in addition to other grounds. Appendix B, p. B9. The Georgia Supreme Court did not address reliance interests and equitable considerations in reaching its conclusion that no refund was due, even though such matters were argued to that court. R.(S93A1217) Appellees' Brief. However, "a respondent or appellee may support the judgment in his favor upon grounds different from those upon which the court below rested its decision." *McGoldrick v. Compagnie Generale Transatlantique*, 309 U.S. 430, 434 (1940).

claim. R.(S93A1217) 120. Thus, a refund would provide a double recovery of these amounts to Beam, to the detriment of other taxpayers. R.(S93A1217) 262-63. Indeed, each court which has considered the State's reliance interests and equitable considerations, for any purpose in the instant matter, has easily concluded that such factors weigh out in favor of the State in this case. *See, e.g., Beam* (U.S.), 111 S.Ct. at 2455-56 (O'Connor, J., dissenting); *Beam* (Ga. I), 259 Ga. 363, 382 S.E.2d 95 (1989); *Beam* (trial court II), Appendix B, p. B9.

B. DUE PROCESS IS SATISFIED BY MULTIPLE PREDEPRIVATION REMEDIES WHICH PETITIONER FAILED TO AVAIL ITSELF OF PRIOR TO PAYMENT OF THE TAX.

This Court has made it clear in both *Harper,* 113 S.Ct. 2510 and *McKesson Corp. v. Florida Alcoholic Beverages & Tobacco Div.,* 496 U.S. 18 (1990) that due process is satisfied in a case like the instant one when the state provides adequate predeprivation remedies:

> If Virginia "offers a meaningful opportunity for taxpayers to withhold contested tax assessments and to challenge their validity in a predeprivation hearing," the "availability of a predeprivation hearing constitutes a procedural safeguard . . . sufficient by itself to satisfy the Due Process Clause."

Harper, 113 S.Ct. at 2519 (quoting *McKesson,* 496 U.S. at 38 n.21). The Court further stated that "*if* no such predeprivation remedy exists," due process obligates the state "to provide meaningful backward-looking relief to

rectify any unconstitutional deprivation." *Id.* (emphasis added). The Court also reaffirmed in *Harper* that:

> The constitutional sufficiency of any remedy thus turns (at least initially) on whether Virginia law "provide[s] a[n] [adequate] form of 'pre-deprivation process,' *for example, by authorizing taxpayers to bring suit to enjoin imposition of a tax prior to its payment, or by allowing taxpayers to withhold payment and then interpose their objections as defenses in a tax enforcement proceeding.*"

Harper, 113 S.Ct. at 2520 (again quoting *McKesson,* 496 U.S. at 36-37) (emphasis added).

At all relevant times, taxpayers in Georgia have been authorized to bring suit to enjoin imposition of an allegedly unconstitutional tax prior to its payment, and Georgia has also provided other remedies allowing an alcohol taxpayer like Petitioner to withhold payment and interpose their objections as defenses in a tax enforcement proceeding. Petitioner acknowledges, as it must, that as long as Georgia provides at least one clear pre-deprivation remedy, due process is satisfied. Petition, p. 16. There is no merit to Petitioner's efforts to obfuscate Georgia's remedies, nor to its "duress" argument. In essence, Petitioner's duress argument rests upon its erroneous assertions regarding the nature of Georgia's alcoholic beverages regulatory system. However, that detailed system and Georgia's liberal set of pre-deprivation procedures amply protect the due process rights of alcohol licensees and taxpayers.[25]

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[25] As discussed in the Statement of the Case, Beam attempts to negate the dual liability feature of the liquor tax, and to give

1. Georgia Provides Adequate Predeprivation Remedies.

Suit to enjoin tax. The availability of a suit for injunctive relief to challenge the constitutionality of an alcohol tax, or other tax provision or alcohol regulation, has long been recognized in Georgia. *See, e.g., Heublein, Inc. v. State,* 256 Ga. 578, 351 S.E.2d 190 (1987), *appeal dismissed,* 483 U.S. 1013 (1987) (suit for declaratory and injunctive relief challenging the constitutionality under the Commerce Clause of Georgia's 1985 distilled spirits taxes); *Blackmon v. Golia,* 231 Ga. 381, 202 S.E.2d 186 (1973) (suit for injunctive relief entertained to challenge constitutionality of alcohol tax statute, and tax struck down as unconstitutional); *Parrish v. Employees' Retirement System,* 260 Ga. 613, 398 S.E.2d 353 (1990), *cert. denied,* 111 S.Ct. 2016 (1991); *State v. Private Truck Council of America, Inc.,* 258 Ga. 531, 371 S.E.2d 378 (1988); *City Council of Augusta v. Mangelly,* 243 Ga. 358, 254 S.E.2d 315 (1979); *Rogers v. DeKalb County Bd. of Tax Assessors,* 247 Ga. 726, 279 S.E.2d 223 (1981); *Wages v. Michelin Tire Corp.,* 233 Ga. 712, 214 S.E.2d 349 (1975), *aff'd,* 423 U.S. 276 (1976); *Richmond County Property Owner's Ass'n v. Augusta-Richmond County Coliseum Authority,* 233 Ga. 94, 210 S.E.2d 172 (1974); *City of Lithonia v. DeKalb County Bd. of Educ.,* 231 Ga. 150, 200 S.E.2d 698 (1973); *Robbins v. City of Rome,*

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the impression that only Beam could purchase tax stamps and that it could not do business in Georgia otherwise. The Georgia Supreme Court expressly rejected that argument in light of O.C.G.A. § 3-4-61(a)(2) (App. FF). *Beam* (Ga. II), App. A, pp. A3-A4.

230 Ga. 901, 199 S.E.2d 802 (1973); *DeKalb County v. Allstate Beer, Inc.*, 229 Ga. 483, 192 S.E.2d 342 (1972). *See also Noble v. Joint City-County Bd. of Tax Assessors of Fulton County*, 672 F.2d 872, 875 (11th Cir. 1982); *Adams v. Smith*, 415 F. Supp. 787 (N.D. Ga. 1976), *aff'd*, 568 F.2d 1232 (11th Cir. 1978); *City of Atlanta v. Spence*, 242 Ga. 194, 249 S.E.2d 554 (1978); *Blackmon v. Alexander*, 233 Ga. 832, 213 S.E.2d 842 (1975).

Thus, even if every one of Beam's disputed characterizations of Georgia's alcohol system were correct, the Georgia courts have consistently entertained suits in equity to enjoin and to rule upon the constitutionality of a Georgia tax.

Suit for declaratory judgment. Georgia law also provides for declaratory judgment suits to challenge the constitutionality of alcoholic beverages statutes or other statutes, including issuance of injunctions as a part of such action. *See* O.C.G.A. §§ 9-4-1 (Appendix GG), 9-4-2 (Appendix HH), 9-4-3(b) (Appendix II), 9-4-10 (Appendix 5); *Heublein, Inc. v. State*, 256 Ga. 578, 351 S.E.2d 190 (1987); *Gravely v. Bacon*, 263 Ga. 203, 429 S.E.2d 663 (1993); *Clein v. Kaplan*, 201 Ga. 396, 40 S.E.2d 133 (1946).

Petitioner's reliance upon the cases cited in footnote 17, on page 29 of the petition, and others which are discussed in the text of the petition is misplaced. Those cases mainly concern the general rule that courts of equity have some discretion and that an adequate remedy at law may preclude a suit in equity, or they address special circumstances in which a declaratory judgment

action may be inappropriate. However, as is clearly indicated by the cases cited in the preceding three paragraphs, the Georgia courts do indeed entertain suits in equity to resolve constitutional challenges to taxes. Petitioner's declaratory judgment and other cases are distinguishable, as involving other situations, such as where a party has begun an appeal remedy which will provide judicial review and then seeks to abandon that remedy for a declaratory judgment action. *See, e.g., Newsome v. Brown,* 252 Ga. 421, 314 S.E.2d 225 (1984). Any overly broad dicta in those cases is not controlling in the situation of an allegedly unconstitutional tax, and the Georgia Supreme Court properly rejected Beam's arguments below, which were based upon essentially the same authorities cited to this Court by Beam.

Tax Enforcement Proceedings. Georgia also provides multiple procedures in which an alcohol taxpayer may interpose his objections to the tax prior to payment, as defenses in a tax enforcement proceeding. A remedy which is commonly employed by alcohol taxpayers is to appeal from a deficiency assessment issued by the Georgia Revenue Department prior to paying a disputed tax. Section 3-2-11(2) (Appendix U) of the Georgia Code expressly provides for appeals by wholesalers or manufacturer/importers under Georgia's Administrative Procedure Act ("APA"). The APA contains both a general appeal remedy and an additional remedy for appealing from any decision, action or inaction of the Revenue Department involving taxes. O.C.G.A. §§ 50-13-13 (Appendix 9), 50-13-12 (Appendix TT). The APA provides for a full administrative hearing, followed by judicial review to resolve constitutional and legal issues.

O.C.G.A. §§ 50-13-13 (Appendix 9), 50-13-19 (Appendix 10), 50-13-20 (Appendix 11). Under this remedy, a constitutional challenge must be raised at the administrative level, but is decided by the superior court and thereafter by the appellate courts. *See, e.g.*, O.C.G.A. § 50-13-19(h) (Appendix 10); *Flint River Mills v. Henry*, 234 Ga. 385, 386-87, 216 S.E.2d 895, 896-97 (1975); *Flowers v. Georgia Real Estate Comm'n*, 141 Ga. App. 105, 232 S.E.2d 586 (1977); *Department of Public Safety v. Foreman*, 130 Ga. App. 71, 202 S.E.2d 196 (1973). *See also Georgia Real Estate Comm'n v. Horne*, 141 Ga. App. 226, 233 S.E.2d 16 (1977).

Other pre-enforcement procedures are also provided by Georgia, including O.C.G.A. §§ 48-2-54 (Appendix PP) (state suit to collect taxes, in which taxpayer may raise objections to the tax), 48-3-1 (Appendix 7) (affidavit of illegality action by taxpayer in superior court to challenge tax which state attempts to collect by levy), and 50-13-10 (Appendix 8) and 50-13-11 (Appendix SS) (procedure for administrative declaratory rulings followed by superior court and appellate court review). *See* Ga. Revenue Rules 560-1-1-.10, *et seq.* (Appendices 11-15).

2. There Is No Merit To The "Duress" Argument.

With no actual threat of sanctions against it in this case, Petitioner mainly argues that the alleged risk of criminal prosecution, seizure of its alcoholic beverages as contraband, or the suspension or cancellation of its liquor license constituted duress or potential sanctions which should be deemed to negate the adequacy of Georgia's

predeprivation remedies. There is no merit to this contention.

Petitioner's assertions are based upon extreme and erroneous characterizations of Georgia's Alcoholic Beverages Code. For example, the contraband statute provides that, "[e]xcept as otherwise specifically provided for by law," non-tax-paid alcohol is contraband. O.C.G.A. § 3-2-33 (Appendix W). Similarly, the criminal provisions only apply to violations of "this title [*i.e.* the Alcoholic Beverages Code, O.C.G.A Title 3]." *See, e.g.*, O.C.G.A. §§ 3-2-36 (Appendix Y), 3-3-27 (Appendix CC). Beam, however, seeks to ignore O.C.G.A. § 3-4-61(a)(2) (Appendix FF) altogether, because it only required tax stamps to be affixed by the time the liquor left the Georgia wholesaler's warehouse for the Georgia retailer. *Beam* (Ga. II), Appendix A, pp. A3-A4. What the law allowed, the Revenue Department could not prosecute or otherwise punish.[26]

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[26] Beam's argument based upon Ga. Revenue Rule 560-2-3-.09 ignores the full statutory scheme, and was properly rejected by the Georgia Supreme Court below. Under O.C.G.A. § 3-4-61(a)(2) (App. FF), the Revenue Department could not, and did not, consider the delivery by a manufacturer of distilled spirits to its licensed, designated wholesaler without tax stamps affixed to be a crime, nor to be contraband which could be seized, nor to be a ground for suspending or cancelling the manufacturer's or wholesaler's liquor license. R.(S93A1217) 120-21. Indeed, no such criminal prosecution, seizure, or action against a manufacturer or the manufacturer's liquor license has ever been brought. *See id.*

Further, even assuming *arguendo* that there could be merit to Beam's arguments, Georgia offers further due process protections by providing a hearing procedure for alcoholic beverages detained as suspected contraband and before

In addition, the mere accrual of interest upon unpaid taxes,[27] if they are ultimately found to be constitutional and due, does not invalidate a predeprivation remedy, and *McKesson* and the other decisions of this Court should not be so read. *See generally United States v. Childs*, 266 U.S. 304, 307 (1924) ("interest [is merely] a means of compensation" to protect against the loss of the time-value of money). Similar considerations should apply regarding Georgia's 10% civil penalty for failure to pay alcohol taxes.[28] *See generally Reisman v. Caplin*, 375 U.S. 440, 446-47 (1964) (IRS contempt penalties); *Ford Motor Co. v. Coleman*, 402 F. Supp. 475, 484 (D. D.C. 1975), *aff'd*, 425 U.S. 927 (1976) (civil penalties on auto manufacturers; "the Constitution is offended [only] when the penalty system . . . create[s] a virtual roadblock to judicial review"). Indeed, Georgia's nonpayment penalty is waivable when a taxpayer has a good faith, reasonable basis for his refusal to pay, *see* O.C.G.A. § 3-2-12 (Appendix V),

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disposition, O.C.G.A. § 3-2-35(d)&(e) (App. 3), and also provides for a hearing from an alcohol license citation prior to any actual suspension or denial of the license, O.C.G.A. § 3-2-3(1) (App. T); Ga. Revenue Rules Chp. 560-2-9 (App. 17).

Finally, even if Beam could have faced criminal exposure, a court of equity would have intervened to prevent injury to an alcohol licensee who was seeking a decision on an allegedly unconstitutional statute. *See Harris v. Entertainment Systems, Inc.*, 259 Ga. 701, 386 S.E.2d 140 (1989).

[27] *See* O.C.G.A. § 3-2-11(5) (App. U) (providing for interest at the rate of 1 percent per month on unpaid alcohol taxes).

[28] *See* O.C.G.A. §§ 3-2-11(3) (App. U), 48-2-44(a) (App. OO) (penalty for willful failure to pay). The fraud penalty is irrelevant to a case of this type. *See* O.C.G.A. § 3-2-11(4) (App. U).

which a good faith constitutional challenge to the validity of the alcohol tax would be.[29]

Petitioner's reliance upon *Atchison, Topeka & Sante Fe Ry. v. O'Connor,* 223 U.S. 280 (1912) is also misplaced. That case involved a state remedial system which the Court assumed provided no suit in equity and no appeal procedures, as Georgia does provide, and a tax statute which automatically forfeited the company's right to do business in the state if the company failed to pay the tax. 223 U.S. at 285. In addition, in that case the taxpayer put the state on notice, at the time of payment, of its dispute over the validity of the tax. 223 U.S. at 287. The instant Georgia situation involves none of those factors.

Similarly, *Brinkerhoff-Faris Trust & Savings Co. v. Hill,* 281 U.S. 673 (1930) is inapposite. That case involved a situation where there was no procedural remedy available at any time under state law for the plaintiff. 281 U.S. at 678-79. While Petitioner tries to use that case to support an argument that *Reich I,* 262 Ga. 625, 422 S.E.2d 846, deprived Beam of due process by ruling § 48-2-35 inapplicable to the federal retiree therein, Beam ignores the fact that the Georgia courts in the instant case assumed *arguendo* (as Beam had asserted) that § 48-2-35 could be available to Beam. *See also Brinkerhoff,* 281 U.S. at 681 n.8

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[29] In addition, the requirement of a surety bond to pursue a remedy such as that provided by O.C.G.A. §§ 48-3-1 (App. 7) or 48-2-59 (App. RR) also does not violate due process. *See Ownbey v. Morgan,* 256 U.S. 94, 108-12 (1921); *McMillen v. Anderson,* 95 U.S. 37, 42 (1877). *See generally Cohen v. Beneficial Industrial Loan Corp.,* 337 U.S. 541, 551-52 (1949).

([even] a change in state court decisions generally does not offend constitutional guarantees).

Also inapplicable is *Ward v. Board of County Comm'rs*, 253 U.S. 17 (1920), which involved actual governmental threats to collect a tax by seizing and selling realty and where the county failed to respect a federal exemption. On those facts, the Court concluded that the state court's finding that the taxes were paid voluntarily was without any fair or substantial support. *Ward* also recognized that state procedural bars in force when the claim was filed may be applied in a suit to recover taxes. 253 U.S. at 25.

C. THERE IS NO MERIT TO PETITIONER'S OTHER ARGUMENTS.

Petitioner's heavy reliance upon *McKesson* overlooks the fact that the instant case involves a 1938, pre-*Bacchus* statute which everyone considered to be constitutional, while *McKesson* involved a post-*Bacchus* statute which made only cosmetic changes to the prior statute and thus violated clearly established law. *McKesson*, 496 U.S. at 46.[30]

Beam's other arguments are equally without merit. For example, Beam erroneously asserts that certain Georgia cases which generally involved § 48-2-35, *e.g.*, petition, p. 24, impliedly precluded Beam from pursuing

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[30] Beam also misunderstands the Florida remedial situation which this Court interpreted in *McKesson* to be inadequate. *See, e.g.*, F.S.A. § 72.011 (authorizing appeals from assessments of various taxes, but *omitting* alcohol taxes [imposed under chapters 564 and 565]).

other, distinct statutory and judicial remedies. Beam's additional efforts to inject the *Reich* case into the instant one, for example by asserting at p. 30 of the petition that *Reich* imposed a protest requirement upon Beam in the instant matter, are baseless. Also in citing the *Heublein* trial court decision (App. P) denying temporary injunctive relief, Beam neglects to point out that the manufacturer did not appeal that decision, but merely pursued its claim for a declaratory judgment on the constitutional issue, which it obtained.

CONCLUSION

For all of the foregoing reasons, Respondents respectfully submit that the Petition for Writ of Certiorari to the Supreme Court of Georgia should be denied.

Respectfully submitted,

DAVID A. RUNNION
Senior Assistant Attorney General
(Counsel of Record for Respondents)

MICHAEL J. BOWERS
Attorney General

DANIEL M. FORMBY
Senior Assistant Attorney General

Attorneys for Respondents

Georgia Department of Law
132 State Judicial Building
40 Capitol Square, S.W.
Atlanta, Georgia 30334-1300
(404) 656-3340

No. 93-1140

In The

Supreme Court of the United States

October Term, 1993

JAMES B. BEAM DISTILLING CO.,

Petitioner,

v.

STATE OF GEORGIA; ZELL MILLER, individually and as Governor of the State of Georgia; MARCUS E. COLLINS, individually and as Georgia State Revenue Commissioner; and CLAUDE L. VICKERS, individually and as Director of the Fiscal Division of the Department of Administrative Services,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of Georgia

APPENDIX TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

TABLE OF CONTENTS OF THE APPENDIX

Page

Appendix 1 – O.C.G.A. § 3-2-13 1-1

Appendix 2 – O.C.G.A. § 3-2-14 2-1

Appendix 3 – O.C.G.A. § 3-2-35 3-1

Appendix 4 – O.C.G.A. § 3-4-152 4-1

Appendix 5 – O.C.G.A. § 9-4-10 5-1

Appendix 6 – O.C.G.A. § 9-11-15(a), (b), & (c) 6-1

Appendix 7 – O.C.G.A. § 48-3-1 7-1

Appendix 8 – O.C.G.A. § 50-13-10 8-1

Appendix 9 – O.C.G.A. § 50-13-13 9-1

Appendix 10 – O.C.G.A. § 50-13-19 10-1

Appendix 11 – O.C.G.A. § 50-13-20 11-1

Appendix 12 – Ga. Revenue Rule 560-1-1-.10..... 12-1

Appendix 13 – Ga. Revenue Rule 560-1-1-.11..... 13-1

Appendix 14 – Ga. Revenue Rule 560-1-1-.12..... 14-1

Appendix 15 – Ga. Revenue Rule 560-1-1-.13..... 15-1

Appendix 16 – Ga. Revenue Rule 560-1-1-.14..... 16-1

Appendix 17 – Ga. Revenue Rules Chp. 560-2-9... 17-1

APPPENDIX 1

O.C.G.A. § 3-2-13. Issuance of refunds or credits for taxes paid or stamps purchased.

(a) The commissioner may issue refunds or credits for taxes paid by or due from a wholesaler or, in the case of taxes on distilled spirits, may issue refunds or credits for stamps purchased by a manufacturer, distiller, or wholesaler when it can be shown to the commissioner's satisfaction that any of the following events have occurred:

(1) Alcoholic beverages have been received by the wholesaler through an error in shipment and the alcoholic beverages are returned to the shipper prior to any sale by the wholesaler in this state;

(2) Alcoholic beverages ordered by the wholesaler have been destroyed in transit prior to entry into the wholesaler's warehouse or storage area;

(3) Alcoholic beverages which are unfit for consumption upon receipt have been received by the wholesaler and the alcoholic beverages are returned to the shipper or destroyed prior to any sale by the wholesaler in this state;

(4) Alcoholic beverages have been destroyed while in the possession of a wholesaler within the state by an act of God, such as fire, flood, lightning, wind, or other natural calamity; or

(5) Wines have been sold by the wholesaler for delivery and consumption outside the state, provided the sale and delivery shall in all

respects comply with the requirements of Code Section 3-6-26.1.

(b) Any manufacturer, distiller, or wholesaler receiving a refund or credit for stamps purchased, in every case where the cost of the stamps has been charged or paid by the wholesaler, shall refund or credit to the wholesaler an amount equal to the credit or refund allowed by the commissioner.

APPENDIX 2

O.C.G.A. § 3-2-14. Limitations on refunds.

If, in the opinion of the commissioner, any refund application filed by an applicant for refund of taxes paid pursuant to this title contains a false statement or if the applicant is indebted to the state, the commissioner shall decline to approve the refund payment until the applicant has complied with the laws of this state. Payment of the refund shall be made, subject to this title, if the commissioner finds that the applicant is justly entitled to the refund. Nothing contained in this Code section shall be construed so as to allow for a refund of any license fee lawfully due or paid under this title.

APPENDIX 3

O.C.G.A. § 3-2-35. Seizure of contraband by commissioner and agents; proceedings upon seizure; hearing on entitlement to seized items; appeals; disposition of items upon which taxes have been paid.

(a) The commissioner and his agents shall seize and take possession of any contraband found in the possession of any person in violation of this title.

(b) Upon seizure, the commissioner or his agent shall give a receipt to the person from whom the contraband property was seized, if known, identifying the property seized and indicating from whom seized and the place of seizure.

(c) A copy of the receipt shall be:

(1) Filed in the office of the commissioner and shall be a public record open to public inspection; and

(2) Posted at the courthouse of the county in which the contraband was seized.

(d) Any person desiring to make claim to the contraband property shall file a claim with the commissioner at his office in Atlanta within ten days from the day of seizure. The commissioner, within 30 days of receipt of any such claim, shall afford the claimant a hearing in which to show his entitlement to the seized items. The burden of proof at such hearing shall be upon the claimant to establish his claim to the items seized and to show compliance with or justification for noncompliance with this Code section. The commissioner shall enter a written

order granting or denying the claim within 30 days from the date of the hearing.

(e) An appeal from the commissioner's order may be taken to the Superior Court of Fulton County by filing with the commissioner, within 15 days from the date of the decision, a notice of appeal to the Superior Court of Fulton County. The appeal shall be based upon the record made before the commissioner; and the commissioner, upon the filing of a notice of appeal, shall transmit the record and appropriate documents to the superior court within 30 days from the date of the filing of notice of appeal. The superior court shall review the record for errors of law, violation of constitutional or statutory provisions, violation of the statutory authority of the agency, lawfulness of the procedure, lack of any evidence to support the decision, and arbitrariness and abuse of discretion. However, the court shall not substitute its judgment for that of the hearing officer as to the weight of evidence on questions of fact.

(f) All alcoholic beverages upon which the taxes have been paid to either this state or any other state shall be disposed of as follows:

(1) In the case of malt beverage, the seized goods shall be destroyed by the commissioner or his authorized agent;

(2) In the case of wine, the seized goods shall be sold by the commissioner at public sale, except that, where seized wine is determined by the commissioner to be unfit for human consumption, it shall be destroyed;

(3) In the case of distilled spirits, the seized goods shall be sold by the commissioner

at public sale, except that, where seized distilled spirits are determined by the commissioner to be unfit for human consumption, the distilled spirits shall be destroyed.

(g) This Code section shall not apply to unlawfully manufactured alcoholic beverages.

APPENDIX 4

O.C.G.A. § 3-4-152. Submission of labels; designation of sales territories and exclusive wholesale distributors; approval by commissioner.

(a) Every manufacturer or shipper shipping distilled spirits for the first time into the state shall:

(1) Submit to the commissioner one label for each brand of distilled spirits to be shipped for the first time by the manufacturer or shipper into this state;

(2) Designate in the application for registration the sales territories for each of its brands sold in this state; and

(3) Name one licensed wholesaler in each territory who shall be the exclusive distributor of the brand within the territory.

(b) Designations of wholesalers and wholesalers' territories as provided in this Code section shall be initially approved by the commissioner and shall not be changed or initially disapproved except for cause. The commissioner shall determine cause after a hearing under regulations promulgated by the commissioner for such purposes.

APPENDIX 5

O.C.G.A. § 9-4-10. Equity jurisdiction not impaired.

Nothing in this chapter is intended to impair the equity jurisdiction of the superior courts of the state.

APPENDIX 6

O.C.G.A. § 9-11-15(a), (b) & (c). Amended and supplemental pleadings.

(a) *Amendments.* A party may amend his pleading as a matter of course and without leave of court at any time before the entry of a pretrial order. Thereafter the party may amend his pleading only by leave of court or by written consent of the adverse party. Leave shall be freely given when justice so requires. A party may plead or move in response to an amended pleading and, when required by an order of the court, shall plead within 15 days after service of the amended pleading, unless the court otherwise orders.

(b) *Amendments to conform to the evidence.* When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues. If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of the evidence would prejudice him in maintaining his action or defense upon the merits. The court may grant a continuance to enable the objecting party to meet the evidence.

(c) *Relation back of amendments.* Whenever the claim or defense asserted in the amended pleading arises out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading. An amendment changing the party against whom a claim is asserted relates back to the date of the original pleadings if the foregoing provisions are satisfied, and if within the period provided by law for commencing the action against him the party to be brought in by amendment (1) has received such notice of the institution of the action that he will not be prejudiced in maintaining his defense on the merits, and (2) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against him.

APPENDIX 7

O.C.G.A. § 48-3-1. Execution for collection of money due the state; affidavit of illegality.

The commissioner may issue an execution for the collection of any tax, fee, license, penalty, interest, or collection costs due the state. The execution shall be directed to all and singular sheriffs of this state or to the commissioner or his authorized representatives and shall command them to levy upon the goods, chattels, lands, and tenements of the taxpayer. Each sheriff shall execute the execution as in cases of writs of execution from the superior courts. Whenever any writ of execution has been issued by the commissioner, the taxpayer, in order to obtain a determination of whether the tax is legally due, may tender to the levying officer his affidavit of illegality to the execution and, upon his payment of the tax if required as a condition precedent by the law levying the tax or upon his giving a good and solvent bond in such an amount to cover the total of any adverse judgment plus costs where the law does not require the payment of the tax as a condition precedent, the levying officer shall return the affidavit of illegality, except as otherwise provided by law, to the superior court of the county of the taxpayer's residence. The affidavit of illegality shall be summarily heard and determined by the court.

APPENDIX 8

O.C.G.A. § 50-13-10. Declaratory judgment on validity of rules; venue for actions.

(a) The validity of any rule may be determined in an action for declaratory judgment when it is alleged that the rule or its threatened application interferes with or impairs the legal rights of the petitioner. A declaratory judgment may be rendered whether or not the petitioner has first requested the agency to pass upon the validity of the regulation in question.

(b) The agency shall be made a party to the action and a copy of the petition shall be served on the Attorney General. The action shall be brought in the Superior Court of Fulton County or in the superior court of the county of residence of the petitioner. When the petitioner is a corporation, the action may be brought in the Superior Court of Fulton County or in the superior court of the county where the petitioner maintains its principal place of doing business in this state. All actions for declaratory judgment, however, with respect to any rule of the Public Service Commission must be brought in the Superior Court of Fulton County.

(c) Actions for declaratory judgment provided for in this Code section shall be in accordance with Chapter 4 of Title 9, the "Declaratory Judgment Act."

APPENDIX 9

O.C.G.A. § 50-13-13. Opportunity for hearing in contested cases; notice; counsel; subpoenas; record; revenue cases.

(a) In addition to any other requirements imposed by common law, constitution, statutes, or regulations:

(1) In any contested case, all parties shall be afforded an opportunity for hearing after reasonable notice served personally or by mail;

(2) The notice shall include:

(A) A statement of the time, place, and nature of the hearing;

(B) A statement of the legal authority and jurisdiction under which the hearing is to be held;

(C) A reference to the particular section of the statutes and rules involved;

(D) A short and plain statement of the matters asserted. If the agency or other party is unable to state the matters in detail at the time, the notice may be limited to a statement of the issues involved. Thereafter, upon application, a more definite and detailed statement shall be furnished; and

(E) A statement as to the right of any party to subpoena witnesses and documentary evidence through the agency;

(3) Opportunity shall be afforded all parties to be represented by legal counsel and to respond and present evidence on all issues involved;

(4) Unless precluded by law, informal disposition may be made of any contested case by stipulation, agreed settlement, consent order, or default;

(5) Unless specifically precluded by statute, in addition to the agency, any contested case may be held before any agency representative who has been selected and appointed by the agency for such purpose. Before appointing a hearing representative, the agency shall determine that the person under consideration is qualified by reason of training, experience, and competence;

(6) The agency, the hearing officer, or any representative of the agency authorized to hold a hearing shall have authority to do the following: administer oaths and affirmations; sign and issue subpoenas; rule upon offers of proof; regulate the course of the hearing, set the time and place for continued hearings, and fix the time for filing briefs; dispose of motions to dismiss for lack of agency jurisdiction over the subject matter or parties or for any other ground; dispose of motions to amend or to intervene; provide for the taking of testimony by deposition or interrogatory; and reprimand or exclude from the hearing any person for any indecorous or improper conduct committed in the presence of the agency or the hearing officer;

(7) Subpoenas shall be issued without discrimination between public and private parties. When a subpoena is disobeyed, any party may apply to the superior court of the county where the contested case is being heard for an order requiring obedience. Failure to comply with such order shall be cause for punishment as for

contempt of court. The costs of securing the attendance of witnesses, including fees and mileage, shall be computed and assessed in the same manner as prescribed by law in civil cases in the superior court;

(8) A record shall be kept in each contested case and shall include:

(A) All pleadings, motions, and intermediate rulings;

(B) A summary of the oral testimony plus all other evidence received or considered except that oral proceedings or any part thereof shall be transcribed or recorded upon request of any party. Upon written request therefor, a transcript of the oral proceeding or any part thereof shall be furnished to any party of the proceeding. The agency shall set a uniform fee for such service;

(C) A statement of matters officially noticed;

(D) Questions and offers of proof and rulings thereon;

(E) Proposed findings and exceptions;

(F) Any decision (including any initial, recommended, or tentative decision), opinion, or report by the officer presiding at the hearing; and

(G) All staff memoranda or data submitted to the hearing officer or members of the agency in connection with their consideration of the case; and

(9) Findings of fact shall be based exclusively on the evidence and on matters officially noticed.

(b) Except in cases in which a hearing has been demanded under Code Section 50-13-12, subsection (a) of this Code section and the other provisions of this chapter concerning contested cases shall not apply to any case arising in the administration of the revenue laws, which case is subject to a subsequent de novo trial of the law and the facts in the superior court.

APPENDIX 10

O.C.G.A. § 50-13-19. Judicial review of contested cases.

(a) Any person who has exhausted all administrative remedies available within the agency and who is aggrieved by a final decision in a contested case is entitled to judicial review under this chapter. This Code section does not limit utilization of or the scope of judicial review available under other means of review, redress, relief, or trial de novo provided by law. A preliminary, procedural, or intermediate agency action or ruling is immediately reviewable if review of the final agency decision would not provide an adequate remedy.

(b) Proceedings for review are instituted by filing a petition within 30 days after the service of the final decision of the agency or, if a rehearing is requested, within 30 days after the decision thereon. The petition may be filed in the Superior Court of Fulton County or in the superior court of the county of residence of the petitioner. When the petitioner is a corporation, the action may be brought in the Superior Court of Fulton County or in the superior court of the county where the petitioner maintains its principal place of doing business in this state. All proceedings for review, however, with respect to orders, rules, regulations, or other decisions or directives of the Public Service Commission must be brought in the Superior Court of Fulton County. Copies of the petition shall be served upon the agency and all parties of record. The petition shall state the nature of the petitioner's interest, the fact showing that the petitioner is aggrieved by the decision, and the ground as specified in

subsection (h) of this Code section upon which the petitioner contends that the decision should be reversed or modified. The petition may be amended by leave of court.

(c) Irrespective of any provisions of statute or agency rule with respect to motions for rehearing or reconsideration after a final agency decision or order, the filing of such a motion shall not be a prerequisite to the filing of any action for judicial review or relief; provided, however, that no objection to any order or decision of any agency shall be considered by the court upon petition for review unless such objection has been urged before the agency.

(d) The filing of the petition does not itself stay enforcement of the agency decision. Except as otherwise provided in this subsection, the agency may grant, or the reviewing court may order, a stay upon appropriate terms for good cause shown. In contested cases involving a license to practice medicine or a license to practice dentistry in this state, a reviewing court may order a stay or an agency may grant a stay only if the court or agency makes a finding that the public health, safety, and welfare will not be harmed by the issuance of the stay.

(e) Within 30 days after the service of the petition or within further time allowed by the court, the agency shall transmit to the reviewing court the original or a certified copy of the entire record of the proceeding under review. By stipulation of all parties to the review proceedings, the record may be shortened. A party unreasonably refusing to stipulate to limit the record may be taxed by the court for the additional costs. The court may require or permit subsequent corrections or additions to the record.

(f) If, before the date set for hearing, application is made to the court for leave to present additional evidence and it is shown to the satisfaction of the court that the additional evidence is material and there were good reasons for failure to present it in the proceedings before the agency, the court may order that the additional evidence be taken before the agency upon conditions determined by the court. The agency may modify its findings and decision by reason of the additional evidence and shall file that evidence and any modifications, new findings, or decisions with the reviewing court.

(g) The review shall be conducted by the court without a jury and shall be confined to the record. In cases of alleged irregularities in procedure before the agency, not shown in the record, proof thereon may be taken in the court. The court, upon request, shall hear oral argument and receive written briefs.

(h) The court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. The court may affirm the decision of the agency or remand the case for further proceedings. The court may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:

(1) In violation of constitutional or statutory provisions;

(2) In excess of the statutory authority of the agency;

(3) Made upon unlawful procedure;

(4) Affected by other error of law;

(5) Clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or

(6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

APPENDIX 11

O.C.G.A. § 50-13-20. Review of final judgment.

An aggrieved party may obtain a review of any final judgment of the superior court under this chapter by the Court of Appeals or the Supreme Court, as provided by law. In contested cases involving a license to practice medicine or a license to practice dentistry in this state, the filing of an application for appeal or a notice of appeal shall not by itself stay enforcement of the agency decision. In such cases, the superior court which considered the petition for judicial review or the Court of Appeals or the Supreme Court may order a stay only if such court makes a finding that the public health, safety, and welfare will not be harmed by the issuance of the stay.

APPENDIX 12

Ga. Revenue Rule 560-1-1-.10. Procedure for Declaratory Rulings.

Any person wishing to file a petition for a declaratory ruling as to the applicability of a statute or rule or order pursuant to Section 12 of the Administrative Procedure Act shall submit three copies of the petition, in writing, to the Department of Revenue, State Office Building, Atlanta, Georgia, stating all of the facts, including the names of those parties involved in the fact situation, the amount of tax involved and a presentation of the legal issue sought to be resolved. The Department will not issue a declaratory ruling on a hypothetical fact situation and any ruling requested must affect a specific fact situation and specific parties.

APPENDIX 13

Ga. Revenue Rule 560-1-1-.11. Taxpayers Demand for Hearing.

(1) Any taxpayer desiring a hearing in any contested case may demand such a hearing by petitioning the Commissioner for such a hearing.

(2) The petition must be in writing and marked or labeled on the front thereof "DEMAND FOR HEARING". The taxpayer must file an original and two copies of the petition in person or by mail addressed to the State Revenue Commissioner, State Office Building, Atlanta, Georgia.

(3) The petition must state:

(a) the names of all parties involved;

(b) the act or failure to act complained of;

(c) a brief statement of the facts;

(d) the amount of the tax involved;

(e) in what respect such taxpayer is aggrieved;

(f) the grounds to be relied upon as a basis for the relief demanded;

(g) the relief requested.

APPENDIX 14

Ga. Revenue Rule 560-1-1-.12. Informal Conference.

Informal conferences may be had with the Commissioner or Unit Director or other employee at the discretion of the Department. An informal conference is not a hearing as defined in the Administrative Practice Act and will not prejudice the rights of any taxpayer or the Department.

APPENDIX 15

Ga. Revenue Rule 560-1-1-.13. Hearings in Contested Cases.

Upon receipt of a "DEMAND FOR HEARING" (See Rule 560-1-1-.11) The [sic] Commissioner will refer the matter in writing to the hearing officer or representative of the agency who will hold the hearing demanded. The date and place of the hearing will be set by such hearing officer or agency representative who will notify all parties involved.

APPENDIX 16

Ga. Revenue Rule 560-1-1-.14. Rules of Practice.

Contested cases which are not subject to a subsequent trial of the law and facts de novo in Superior Court shall be conducted in accordance with the requirements of the Georgia Administrative Practice Act. Generally cases instituted by the Department of Revenue are subject to subsequent de novo trial.

APPENDIX 17

GA. REVENUE RULES CHP. 560-2-9.

ALCOHOLIC BEVERAGE LICENSE HEARINGS

560-2-9-.01 Applicability of These Rules.

The rules in this Chapter shall apply to and govern only those administrative hearings regarding alcoholic beverage licenses as follows:

(a) Any hearing to be held as a result of any citation against any holder of an alcoholic beverage license issued under the provisions of the Georgia Alcoholic Beverage Code for the alleged violation of any law, rule or regulation concerning the manufacture, sale, use, possession or disposition of alcoholic beverages in this State.

(b) Any hearing requested or afforded as the result of the denial of any application, or the refusal to issue or renew any alcoholic beverage license issued under the provisions of the Georgia Alcoholic Beverage Code.

(c) These rules shall not apply to all other administrative hearings arising out of the Alcoholic Beverage Code which are governed by and conducted under the provisions of the Georgia Administrative Procedure Act.

560-2-9-.02 Persons Authorized To Hold Hearings; Authority of Hearing Officer.

Administrative hearings referenced in these rules will be held by a Hearing Officer appointed by the Commissioner to hear such cases. When any person other than the Commissioner acts as Hearing Officer in such matters, the Hearing Officer's actions, decisions and orders shall be deemed to be on behalf of the Commissioner and

effective as though taken by the Commissioner, subject to the appeals procedures as hereinafter provided. The Hearing Officer shall be empowered to exercise the same degree of authority and to do the same acts as hearing officers empowered under the Georgia Administrative Procedure Act, O.C.G.A. § 50-13-13.

560-2-9-.03 Nature of the Proceeding; Hearing Procedure; Burden of Proof.

The hearings held under these Rules shall be only as formal as is necessary to preserve order and be compatible with the principles of justice. Where the Department is the charging party, a representative shall first present the Department's case and the licensee or applicant will then have the opportunity to present his case, to rebut the allegations made against him and present whatever defenses he has. All parties shall have the right to be represented by legal counsel and to subpoena witnesses and documentary evidence through the agency. The parties shall have the right to respond and present evidence on all issues involved and to cross examine all witnesses. The standard of proof on all issues in the hearing shall be a preponderance of the evidence and a determination will be made on the basis of the competent evidence presented at the hearing. Except in such matters wherein the burden of proof is upon a specific party as provided by law, such burden of proof shall be upon the charging or petitioning party.

560-2-9-.04 Evidence; Official Notice.

The rules of evidence in hearings covered by this Chapter shall substantially be as follows:

(a) Irrelevant, immaterial, or unduly repetitious evidence shall be excluded. The rules of evidence as applied in the trial of civil non-jury cases in the superior courts shall be followed as far as practicable. When necessary to ascertain facts not reasonably susceptible of proof under such rules, evidence not admissible thereunder may be admitted, except where precluded by statute, if it is of a type commonly relied upon by reasonably prudent men in the conduct of their affairs;

(b) Documentary evidence may be received in the form of copies or excerpts if the original is not readily available. Upon request, parties shall be given an opportunity to compare the copy with the original or have it established as documentary evidence according to the rules of evidence applicable to the superior courts of this state;

(c) A party may conduct such cross-examination as shall be required for a full and true disclosure of the facts;

(d) Official notice may be taken of judicially recognizable facts and generally recognized technical facts or records within the agency's specialized knowledge. The parties shall be notified of any material so noticed and shall be afforded the opportunity to contest such material.

560-2-9-.05 Executive Orders.

As soon as possible after the close of a hearing, the Hearing Officer shall issue an Executive Order in the case and forward same to the Enforcement Section of the Alcohol and Tobacco Tax Unit for service and execution. The Order shall contain the determination of the Hearing

Officer and any penalties to be imposed as a result of the proceeding. Unless the execution of the Order is stayed by the Commissioner or Hearing Officer, the execution of the Order is to be effective on the date specified in the Order or upon service of the Order if no other effective date is so specified.

560-2-9-.06 Intra-Agency Appeal Procedure; Post Hearing Motions.

The following two-step appeal procedure shall be the exclusive administrative remedy for appealing decisions entered pursuant to these regulations.

(a) *Request for Reconsideration:* A licensee or applicant who is aggrieved by the Executive Order entered by the Hearing Officer, may appeal by filing a Request for Reconsideration with the Hearing Officer who heard the case no later than 10 days after service. The Hearing Officer shall review the request and thereafter either deny the request or modify the initial Executive Order by an Order on Reconsideration.

(b) *Motion for Review:* Provided a timely Request for Reconsideration was filed with the initial Hearing Officer, a licensee or applicant shall have 10 days from the date of receipt of the Hearing Officer's Order on Reconsideration (or denial of request), to file with the State Revenue Commissioner, a written Motion for Review. Such motion shall set forth a concise statement of the basis upon which the appeal is made together with supporting argument setting forth any enumeration of erroneous conclusions of law or determination and any claim that the Executive Order contains an exercise of discretion or policy which is of such importance that the Commissioner should, in his

discretion, review. No evidence outside the record shall be considered. After due consideration and as soon as practicable, the Commissioner or his designee shall either grant or deny the Motion for Review. If the Motion is denied, the Hearing Officer's Executive Order shall automatically become the Final Decision of the Agency. If the Motion is granted, the Commissioner will either remand the case to the Hearing Officer for additional proceedings or issue a Final Order either modifying or upholding the Executive Order. Except in the case of an Order remanding the case, either the Commissioner's Final Order, or the Commissioner's denial of a Motion for Review entered pursuant to this procedure shall constitute final agency action and shall not be further appealable within the Revenue Department.

(c) *Application to Stay Execution of Order:* The filing of a Request for Reconsideration or Motion for Review does not automatically, of itself, stay the execution and enforcement of any Order of the Hearing Officer or Commissioner. However, a request to stay the execution and enforcement of any Order may be made with the Request for Reconsideration or Motion for Review and the Hearing Officer or Commissioner may grant such request to stay upon appropriate terms for good cause shown.

(d) *Waiver of Administrative Appeal:* The failure of any party to follow the intra-agency appeal procedure as outlined in this Rule shall constitute a waiver of agency appeal rights and the Hearing Officer's Executive Order shall automatically become the Final Order of the Commissioner 10 days after service of the initial Order.

560-2-9-.07 Continuances and Postponements.

Matters set for hearing may be continued or postponed within the sound discretion of the Hearing Officer upon timely motion by either party or by the Hearing Officer on his own motion.

560-2-9-.08 Subpoena Forms; Service.

Either party may obtain subpoena forms from the Hearing Officer by making a timely request for same. The service, proof of service and enforcement of subpoenas shall be as provided by law and shall be the responsibility of the party requesting the subpoena.

560-2-9-.09 Transcripts of Hearing.

Any party may request that the hearing be conducted before a court reporter. The request shall be in writing and include an agreement by the requesting party that he shall pay the costs incurred by the request or that he shall procure at his own cost and on his own initiative, the court reporting services for the hearing. Regardless of who makes the arrangements or requests the transcript be made, the original transcript of the proceedings shall be submitted to the Hearing Officer prior to the close of the hearing record if such transcript is to be made part of the record.

No. 93-1140

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In The

Supreme Court of the United States

October Term, 1993

JAMES B. BEAM DISTILLING CO.,

Petitioner,

v.

STATE OF GEORGIA; JOE FRANK HARRIS, individually; ZELL MILLER, individually and as Governor of the State of Georgia; MARCUS E. COLLINS, individually and as Georgia State Revenue Commissioner; and CLAUDE L. VICKERS, individually and as Director of the Fiscal Division of the Department of Administrative Services,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of Georgia

REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Counsel of Record:

MORTON SIEGEL
SIEGEL, MOSES, SCHOENSTADT & WEBSTER, P.C.
One Illinois Center
111 East Wacker Drive, Suite 2800
Chicago, Illinois 60601-4798
Telephone: 312/540-4300

JOHN L. TAYLOR, JR.
CELESTE MCCOLLOUGH
MATTHEW L. HESS
JEFFERY T. COLEMAN
VINCENT, CHOREY, TAYLOR & FEIL
A PROFESSIONAL CORPORATION
The Lenox Building, Suite 1700
3399 Peachtree Road, N.E.
Atlanta, Georgia 30326
Telephone: 404/841-3200

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

Page

I. The Respondents' Supposed *Chevron*/Reliance Defenses Conflict With The Applicable Decisions Of This Court 1

II. The State Court's Standing Defense Does Not Provide An Adequate And Independent State Ground; Petitioner's Purported Lack of Standing Under The Refund Statute Does Not Convert The Refund Statute to A Clear and Certain Remedy So As to Satisfy Due Process..... 3

III. Respondents Have Mischaracterized The System For Collection Of Alcohol Taxes In Order To Avoid The Due Process Implications Of The Duress That Forced the Petitioner To Pay The Tax And Challenge Its Constitutionality Later 6

IV. The Respondent Had No Clear And Certain Prospective Remedy Under Georgia Law 7

CONCLUSION 10

TABLE OF AUTHORITIES

Page

I. STATUTES

O.C.G.A. § 3-2-13 7

O.C.G.A. § 3-2-14 7

O.C.G.A. § 3-2-35 7

O.C.G.A. § 3-4-61 7

O.C.G.A. § 48-2-35 ..... 2, 4

O.C.G.A. § 50-13-10 7

II. REGULATIONS OF THE STATE OF GEORGIA

Georgia Revenue Rule § 560-2-2-.09 7

Georgia Revenue Rule § 560-2-2-.28 7

Georgia Revenue Rule § 560-2-2-.29 7

Georgia Revenue Rule § 560-2-3.-01 6

Georgia Revenue Rule § 560-2-3-.03 6

Georgia Revenue Rule § 560-2-3-.09 7

Georgia Revenue Rule § 560-2-3-.10 7

Georgia Revenue Rule § 560-2-3-.22 7

Georgia Revenue Rule § 560-2-3-.30 7

III. DECISIONS OF THE UNITED STATES SUPREME COURT

American Trucking Association, Inc. v. Smith, 496 U.S. 167, 110 S. Ct. 2323 (1990) 2

Bacchus Imports v. Dias, 468 U.S. 263, 104 S. Ct. 3049 (1984) 2, 3

TABLE OF AUTHORITIES – Continued

Page

Chevron Oil Co. v. Huson, 404 U.S. 97 (1971) 1, 2

Harper v. Virginia Department of Taxation, 509 U.S. ___, 113 S. Ct. 2510 (1993) 4

Hostetter v. Idlewild Bon Voyage Liquor Corp., 377 U.S. 324 (1964) 3

James B. Beam Distilling Co. v. Georgia, 501 U.S. ___, 111 S. Ct. 2439 (1991) 1, 5

McKesson Corp. v. Division of Alcoholic Beverages and Tobacco, Dept. of Business Regulation of Florida, 496 U.S. 18, 110 S. Ct. 2238 (1990) 1, 2, 3

Reich v. Collins, 509 U.S. ___, 111 S. Ct. 2439 (1991) 5, 6, 9

United States v. Jefferson Elec. Mfg. Co., 291 U.S. 386, 54 S. Ct. 443 (1934) 4

IV. OTHER DECISIONS

Benton v. Gwinett County Board of Education, 168 Ga. App. 533, 309 S.E.2d 680 (1983) 8

Blackmon v. Alexander, 233 Ga. 832, 213 S.E.2d 842 (1975) 8

Collins v. Waldron, 259 Ga. 582, 385 S.E.2d 74 (1989) 1, 5, 8, 9

Flint River Mills v. Henry, 234 Ga. 385, 216 S.E.2d 895 (1975) 8

George v. Dept. of Natural Resources, 250 Ga. 491, 299 S.E.2d 556 (1983) 8

Georgia Public Service Comm'n v. Southern Bell, 254 Ga. 244, 327 S.E.2d 726 (1985) 8

Guice v. Pope, 229 Ga. 136, 189 S.E.2d 424 (1972) 8

TABLE OF AUTHORITIES – Continued

Page

Henderson v. Carter, 229 Ga. 876, 195 S.E.2d 4 (1972) 1, 5, 8, 9

Heublein, Inc. v. State, 256 Ga. 578, 351 S.E.2d 190 (1987) 9

Reich v. Collins, 262 Ga. 625, 422 S.E.2d 846 (1992) ... 4, 5

Reich v. Collins, 263 Ga. 602, 437 S.E.2d 320 (1993) 5

Rybert & Co. v. City of Atlanta, 258 Ga. 347, 368 S.E.2d 739 (1988) 8

Schieffelin & Co. v. Strickland, 253 Ga. 385, 320 S.E.2d 358 (1984) 8

State v. Private Truck Council of America, Inc., 258 Ga. 531, 371 S.E.2d 378 (1988) 9

Wright v. Forrester, 192 Ga. 864, 16 S.E.2d 873 (1941) 5, 8

The Petitioner respectfully submits the within Reply to the Respondents' Brief ("Resp. Brf."):

I. The Respondents' Supposed *Chevron*/Reliance Defenses Conflict With The Applicable Decisions Of This Court.

The Respondents attempt to resurrect the arguments that failed them in *James B. Bean Distilling Co. v. Georgia*, 501 U.S. ___, 111 S. Ct. 2439 (1991) ("*Beam* (U.S.)"). Based on the same facts at issue here, the Court rejected what had become known as the "*Chevron* factors," *see Chevron Oil C. v. Huson*, 404 U.S. 97 (1971), in determining the applicability of the court's decisions of law in civil actions. *Beam* (U.S.), 501 U.S. at ___, 111 S. Ct. at 2448. By asserting under the label of equitable reliance that all of the old *Chevron* factors now come into full play with respect to remedial questions, the Respondents suggest that *Beam* implicitly overruled the Court's unanimous decision in *McKesson Corp. v. Division of Alcoholic Beverages and Tobacco*, 496 U.S. 18, 110 S. Ct. 2238 (1990). Yet, *McKesson* stands as authority for the proposition that a taxpayer's due process rights cannot be undercut by supposed equitable considerations when the State may protect itself by invoking procedural protections: The State's "failure to avail itself of certain . . . methods of self-protection weakens any 'equitable' justification for avoiding its obligation to provide relief." *McKesson*, 110 S. Ct. at 2255.[1] On the same day it issued the *McKesson* decision,

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[1] This is particularly so where a state successfully defeats interim equitable relief in advance of paying taxes because of the existence of a refund statute, as Georgia itself has done. *Compare Collins v. Waldron*, 259 Ga. 582, 385 S.E.2d 74, 75 n.1 (1989); *Henderson v. Carter*, 229 Ga. 876, 195 S.E.2d 4, 7 (1972); and *Wright v. Forrester*, 192 Ga. 864, 16 S.E.2d 873 (1941), *with*

the Court further held in *American Trucking Associations, Inc. v. Smith,* 496 U.S. 167, 110 S. Ct. 2323, 2334, 2339 (1990) (O'Connor, J., emphasis supplied), that "*McKesson* makes plain that equitable considerations are of limited significance once a constitutional violation is found; . . . Once [as here], a constitutional decision applies and renders a state tax invalid, *due process,* not equitable considerations, will generally dictate the scope of relief offered." *Harper* reaffirmed the principles of *McKesson.*

By revoking the Refund Statute for constitutional claims (*see* discussion, § II, *infra*), Georgia voluntarily relinquished what procedural protection it might otherwise have been able to invoke under the Refund Statute, such as the statute of limitations and even its purported standing defense. Additionally , the pre-*Reich* Refund Statute literally invited the Petitioner to pay the taxes first and seek a refund later, rather than seek somehow to protest the payment or otherwise put the State on notice of the claim of unconstitutionality prior to payment. O.C.G.A. § 48-2-35(a) (refund "shall" be granted whether tax paid "voluntarily or involuntarily").

Moreover, even if this Court were now to change course and engage in a *Chevron*-type analysis with respect to remedial questions, no basis exists here for denying relief. Under *Chevron,* the Court must first decide whether its decision at issue, in this case *Bacchus Imports v. Dias,* 468 U.S. 263, 104 S. Ct. 3049 (1984), established a new principle of law. *Chevron,* 404 U.S. at 106. The clear majority in *Bacchus* held that "one thing is *certain:* The central purpose of the [Twenty-first Amendment] was not to empower States to favor local liquor industries by

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McKesson, 110 S. Ct. at 2255 and n.29. The State of Georgia has repeatedly defeated attempts to obtain equitable relief based upon the existence of the Refund Statute.

erecting barriers to competition. It is also *beyond doubt* that the Commerce Clause itself furthers strong federal interests in preventing economic Balkanization." *Bacchus, supra,* 104 S. Ct. at 3058 (emphasis supplied). Accordingly, "because the tax violates a *central tenet* of the Commerce Clause but is not supported by any clear concern of the Twenty-first Amendment," *id.* (emphasis supplied), the *Bacchus* Court easily rejected Hawaii's Twenty-first Amendment defense without overruling any binding precedent or embarking on a new direction. *See, e.g., Hostetter v. Idlewild Bon Voyage Liquor Corp.,* 377 U.S. 324, 331-32 (1964) (Twenty-first Amendment no *pro tanto* repeal of the Commerce Clause). For this reason, and based upon the other *Chevron* factors, the Petitioner's right to a remedy in the instant case would be supported by application of the *Chevron* factors, and Respondents' so-called reliance interests are ill-founded.

To buttress their argument, the Respondents harken back to their "double recovery" or "pass-on" argument. Such an argument has already been rejected by this Court: " '[E]quitable considerations' [do not] justify a State's attempt to avoid bestowing this so-called 'windfall' when redressing a tax that is unconstitutional because discriminatory. . . . the pass-on itself furthers the very competitive disadvantage constituting the Commerce Clause violation . . . " *McKesson,* 110 S. Ct. at 2256.

II. The State Court's Standing Defense Does Not Provide An Adequate And Independent State Ground; Petitioner's Purported Lack of Standing Under The Refund Statute Does Not Convert The Refund Statute to A Clear and Certain Remedy So As to Satisfy Due Process.

Respondents, by seeking to limit the Petitioner's cause of action to one under the Refund Statute, *see* Resp.

Brf. at 3, argue that the purported standing defense under the Refund Statute, O.C.G.A. § 48-2-35, constitutes an adequate state ground for the decision below so as to preclude this Court's review. But Petitioner also asserted claims directly under the Due Process Clause and other provisions of the U.S. Constitution. App. O ¶¶ 71-73.[2] The Refund Statute/standing portion of the decision below did not answer the Petitioner's constitutional causes of action,[3] Resp. Brf. 14, and thus was not an adequate independent state law ground to preclude this Court's review. *See Harper v. Virginia Department of Taxation*, 509 U.S. ___, 113 S. Ct. 2510, 2519 (1993) (no "independent and adequate ground that [state's] law of remedies offered no 'retrospective refund remedy' "). Due Process required the Georgia courts to determine whether Georgia offered any "clear and certain" predeprivation or postdeprivation remedy. *Id.* at 2519 and n.10.

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[2] In a footnote, the Respondent misrepresents that the Petitioner asserted its Federal constitutional claim only after the trial court on remand rejected the Petitioner's claim under the Refund Statute. Resp. Brf. at 8 n.12. In fact, the Petitioner asserted its Federal constitutional claims *after* the Georgia Supreme Court held for the first time in *Reich* (Ga. I) that the Refund Statute did not apply to constitutional claims but *before* the trial court entered summary judgment against the Petitioner under the Refund Statute. *Compare* App. O (12/23/92 Complaint amendment) *with* App. B (2/11/93 summary judgment order) *and* App. L (12/17/92 denial of reconsideration in *Reich* (Ga. I)).

[3] *McKesson* dealt with and rejected in the Commerce Clause context the *United States v. Jefferson Elec. Mfg. Co.*, 291 U.S. 386, 54 S. Ct. 443 (1934) line of "pass-on" cases cited at Resp. Brf. n.21. *McKesson*, 110 S. Ct. at 2256. Respondents' Georgia sales tax cases are likewise inapposite to a Commerce Clause discrimination claim. *See* Petition at 25 n.15.

Regardless of the standing issue, after *Reich*, Georgia offers taxpayers no postdeprivation remedy at all.

Until the Georgia Supreme Court's decisions in *Reich v. Collins*, 262 Ga. 625, 422 S.E.2d 846 (1992) ("*Reich* (Ga. I)"), *vacated and remanded*, 509 U.S. ___, 111 S. Ct. 2439 (1991) ("*Reich* (U.S.)"), *on remand*, 263 Ga. 602, 437 S.E.2d 230 (1993), *cert. granted* ("*Reich* (Ga. II)"), Georgia uniformly recognized that the Refund Statute applied to constitutional claims.[4] The Georgia Supreme Court expressly recognized the Refund Statute's legislative purpose as stated by the Governor to the General Assembly:

> I am attaching a file * * * showing certain taxes that have been paid into the State treasury under *laws that have since been declared unconstitutional.* There is no provision without an act of the legislature, to pay these taxes to these debtors of the State who have paid these unconstitutional taxes. This is a moral obligation of the State. I hereby recommend legislative action to provide for the repayment of these amounts. House Journal 1937, volume 1, pp. 505-567.

Wright v. Forrester, 16 S.E.2d 873, 874 (emphasis supplied). *See also Waldron*, 259 Ga. 582, 385 S.E.2d 74, 75 n.1 (the *Refund Statute* provides an adequate remedy for unconstitutional tax); *Henderson*, 229 Ga. 876, 195 S.E.2d 4, 7 (same). In light of *Reich*, these conflicting decisions of the

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[4] Respondents' citation to their summary judgment brief *after* remand of the case from this Court, Resp. Brf. at 10 n.16 (citing R. (S93A1217) 329), *supports* the Petitioner's statement that "From 1985 . . . *until this Court's 1991 decision in Beam (U.S. I)*, . . . Respondents . . . agreed that Georgia's Refund Statute" applied. Petition at 4 (emphasis supplied). Respondents now seek to reinterpret the record below and their oral argument to this Court to mean that they always questioned the *applicability* of the Refund Statute to Petitioner's claims. *Id.* 11 & n.17.

Georgia Supreme Court *ipso facto* mean that there is nothing clear or certain about Georgia's retrospective remedy, except that it does not now exist. Indeed, for this reason, the instant case is on all fours with *Reich*, as to which this Court has now granted the petition for writ of certiorari.

III. Respondents Have Mischaracterized The System For Collection Of Alcohol Taxes In Order To Avoid The Due Process Implications Of The Duress That Forced the Petitioner To Pay The Tax And Challenge Its Constitutionality Later.

Of course, the Respondents are now free to say that the Petitioner could simply have shipped its product to its wholesalers without facing any penalty or other adverse consequence because Georgia no longer utilizes the tax stamp system as it did during the years in question here, *see* Resp. Brf. at 6 n.6, and Respondents can now without practical consequence reverse course and tell the Petitioner that it never had any tax stamp obligation at all. But what objectively, reasonably appeared to be the Petitioner's "clear and certain" remedy for redress of its constitutional claims is what now counts, and on this issue, Georgia's statutes and regulations speak for themselves.

So Respondents now rely heavily upon unattributed cites to affidavits of their own employees, for the proposition that registered producers such as the Petitioner had no pre-shipment tax stamp obligation under Georgia law.[5] Respondents must rely upon such testimony because their own regulations consistently supported the opposite proposition. *See* Revenue Rules 560-2-3-.01 and -.03 (App. ZZ-AAA) (defining "registered producer" as a

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[5] *See* Resp. Brf. at 6, 7, 19, 25 n.26 (cites to R (S93A1217) 110-307).

manufacturer or distiller with plants outside Georgia); 560-2-3-.22 (App. CCC) (only registered producers may ship spirits into the State); 560-2-3-.09 (App. Q) (distilled spirits may not be moved into the State unless stamps have been affixed); 560-2-3-.30 (App. DDD) (registered producers must inspect goods upon their arrival into the State and affix stamps if they are not already affixed). The statute upon which Respondents rely obligated *"[a]ll* manufacturers, distillers, or wholesalers *who* sell, *ship,* or deliver *to each other,"* O.C.G.A. § 3-4-61(a)(3) (App. FF, emphasis supplied), to purchase and affix stamps. Respondents' argument that O.C.G.A. § 3-4-61 placed "dual liability," Resp. Brf. at 20 n.25, upon producers and wholesalers does not mean that *no* liability or duress was placed upon the Petitioner. Petitioner was compelled to pay the taxes in advance if it wanted to continue to do business in Georgia. *See* Petition at 18-23. *See also* O.C.G.A. § 3-2-35 (App. 3); Rev. Rules §§ 560-2-2-.28 (App. XX), 560-2-2-.09 (App. WW); 560-2-2-.29 (App. YY) & 560-2-3-.10 (App. BBB).

IV. The Respondent Had No Clear And Certain Prospective Remedy Under Georgia Law.

None of the administrative remedies relied upon by the Court below or the Respondents here[6] removed what could only be understood as prepayment duress to pay the tax. Moreover, the Petitioner had no clear and certain

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[6] Respondents add to the Georgia court's list of remedies an alcoholic beverages credit procedure that has nothing to do with claims of constitutionality, O.C.G.A. §§ 3-2-13 and -14 (App. 1 & 2), and the procedure for "Declaratory judgment on the validity of *rules* [not statutes]." O.C.G.A. § 50-13-10 (App. 8, *et seq.*).

predeprivation remedy by way of injunctive or declaratory relief. In the absence of a clear and certain right to interim relief, a declaratory judgment action would not have removed the ongoing duress to continue paying the tax during the course of the litigation. *See* Petition at 27-28.

The Refund Statute remedy, which commenced with an administrative claim, applied to constitutional claims and had been specifically held by the Georgia courts to bar equitable and declaratory relief. *Waldron*, 385 S.E.2d 74, 75 n.1; *Henderson*, 195 S.E.2d 4, 7; *Wright*, 16 S.E.2d 873. *See also Guice v. Pope*, 229 Ga. 136, 189 S.E.2d 424, 426 (1972) (a "court of equity will not take jurisdiction of an action where an administrative remedy is provided by statute"); *Flint River Mills v. Henry*, 234 Ga. 385, 216 S.E.2d 895, 897 (1975) ("where a statute provides a party with a means of review by an administrative agency, such procedure is generally an adequate remedy at law so as to preclude the grant of equitable relief" (citations omitted)); *Georgia Public Service Comm'n v. Southern Bell*, 254 Ga. 244, 327 S.E.2d 726, 728 (1985) ("[w]hen this statutory right of review is available, a complaint in equity is not" (citing *Schieffelin & Co. v. Strickland*, 253 Ga. 385, 320 S.E.2d 358 (1984))); *Rybert & Co. v. City of Atlanta*, 258 Ga. 347, 368 S.E.2d 739, 742 (1988) (denial of declaratory judgment remedy "predicated upon the availability of the administrative appeal"); *Benton v. Gwinett County Board of Education*, 168 Ga. App. 533, 309 S.E.2d 680, 682 (1983) (declaratory judgment not available "where other statutory remedies have been specifically provided" (quoting *Georgia v. Dept. of Natural Resources*, 250 Ga. 491, 493, 299 S.E.2d 556, 557-58 (1983))).

Respondents' cases at most demonstrate an inconsistency in Georgia law, making such a remedy at best not clear and not certain. For instance, *Blackmon v. Alexander*,

233 Ga. 832, 213 S.E.2d 842, 845 (1975), actually stands for the proposition that an available statutory proceeding will defeat equitable relief: "*In the absence of some remedial review prescribed by law,* equity is available." *Id.* (emphasis supplied). Only one case cited by Respondents, *State v. Private Truck Council of America, Inc.*, 258 Ga. 531, 371 S.E.2d 378 (1988), dealt with the availability of injunctive relief and also even mentioned the Refund Statute. But there, the Court simply did not discuss whether the availability of the Refund Statute constituted a statutory remedy so as to preclude the exercise of equitable/declaratory jurisdiction. Perhaps the State did not raise that issue as a defense. But even more importantly, in a *later* case, *Waldron*, 385 S.E.2d 74, 75 n.1 (1989), and consistently with *Henderson*, 195 S.E.2d 4, 7 and *Wright*, 16 S.E.2d 873, other taxpayers (Federal retirees) were denied injunctive escrow relief because "the refund statute (O.C.G.A. § 48-2-35) provides an adequate remedy" – a remedy, by the way, held in *Reich* to be *inapplicable* to *Waldon/Davis*-type claims.

The remainder of Respondents' cases say nothing about the existence of any available statutory remedy, or whether, if such a remedy existed, the litigant was allowed to by-pass the statutory procedure and resort directly to equity or a declaratory judgment action. Absent such direction about the facts of the cases and the arguments and defenses raised by the parties, these cases lack any precedential value on this issue. *See* Resp. Brf. at 21-23. In some of these cases, all relief was denied on the merits. Thus, the courts may have denied relief on the *alternative* ground of the lack of support for the substantive claims. *Id.* The case, *Heublein, Inc. v. State*, 256 Ga. 578, 351 S.E.2d 190 (1987), *appeal dismissed for lack of properly presented federal question*, 483 U.S. 1013 (1987), upon which Respondents place heavy reliance, fails

Respondents for both of these reasons. Once interlocutory relief was denied based upon the availability of the Refund Statute, *see* App. P, the courts *in rejecting the plaintiff's claims on the merits* did not further discuss what, if any, impact, the availability of the Refund Statute had upon the availability of injunctive or declaratory relief. Thus, while some plaintiffs in Georgia may at times have been fortunate enough to avoid the defense of a statutory remedy to defeat equitable/declaratory relief and obtain a ruling on the merits, when the Petitioner had to pay its taxes, such a suit provided no *clear or certain* remedy.

CONCLUSION

The Petitioner respectfully requests that its Petition be granted.

Respectfully submitted,

Counsel of Record:

MORTON SIEGEL
SIEGEL, MOSES, SCHOENSTADT & WEBSTER
One Illinois Center
111 East Wacker Drive,
Suite 2800
Chicago, Illinois 60601-4798
Telephone: 312/540-4300

JOHN L. TAYLOR, JR.
VINCENT, CHOREY, TAYLOR & FEIL
A Professional Corporation
The Lenox Building, Suite 1700
3399 Peachtree Road, N.E.
Atlanta, Georgia 30326
Telephone: 404/841-3200

No. 93-1140

In The

Supreme Court of the United States

October Term, 1993

JAMES B. BEAM DISTILLING CO.,

Petitioner,

v.

STATE OF GEORGIA; JOE FRANK HARRIS, individually; ZELL MILLER, individually and as Governor of the State of Georgia; MARCUS E. COLLINS, individually and as Georgia State Revenue Commissioner; and CLAUDE L. VICKERS, individually and as Director of the Fiscal Division of the Department of Administrative Services,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of Georgia

APPENDIX TO REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

APPENDICES

WW Georgia Department of Revenue Administrative Rule No. 560-2-2-.09 ..... WW1

XX Georgia Department of Revenue Administrative Rule No. 560-2-2-.28 ..... XX1

YY Georgia Department of Revenue Administrative Rule No. 560-2-2-.29 ..... YY1

ZZ Georgia Department of Revenue Administrative Rule No. 560-2-3-.01 ..... ZZ1

AAA Georgia Department of Revenue Administrative Rule No. 560-2-3-.03 ..... AAA1

BBB Georgia Department of Revenue Administrative Rule No. 560-2-3-.10 ..... BBB1

CCC Georgia Department of Revenue Administrative Rule No. 560-2-3-.22 ..... CCC1

DDD Georgia Department of Revenue Administrative Rule No. 560-2-3-.30 ..... DDD1

APPENDIX WW

Georgia Department of Revenue Administrative Rule No. 560-2-2-.09 Licensing Qualifications. Amended.

(1) Every applicant for a state license, permit, or registration to deal in beverage alcohol products, shall make application on forms furnished by the Commissioner and in connection therewith shall under oath answer all questions, supply all information, and furnish all certificates, affidavits, bonds and other supporting data or documents as required thereby. Applicants for retail dealer licenses to deal in distilled spirits shall further comply with the provisions of Section 560-2-3-.35 of these Regulations.

(2) Applications for a state license, permit, or registration shall be in the same name of the individual, corporation, fraternal organization or partnership as that required by local governing authorities for a local license.

(a) Any fraternal organization shall be permitted to apply for license in the name of any qualified officer or member of such organization. For the purpose of this Regulation, fraternal organization shall refer to any society, order or supreme lodge, whether incorporated or not, conducted solely for the benefit of its members and their beneficiaries and not for profit, operated on the lodge system with ritualistic form of work and having a representative form of government.

(b) Any domestic corporation lawfully registered and doing business under the laws of this State, or any foreign corporation lawfully registered under the laws of another state and authorized by the Secretary of State to do business in this State, which seeks to obtain a license

as a retail dealer or retail consumption dealer, may be permitted to apply for such license in the name of the corporation as it is registered in the Office of the Secretary of State. Provided, however:

1. In its application for retail dealer or retail consumption dealer license, said corporation shall provide the Commissioner with the name of its agent authorized to receive service of process under the laws of this State, and also provide the Commissioner with the address of its registered office.

2. In the event that such corporation shall fail to appoint or maintain a registered agent in this State as required by law, or whenever its registered agent cannot with due diligence be found at the registered office of the corporation as designated in its application for retail dealer or retail consumption dealer license, the Commissioner shall be appointed agent to receive any citation for violation of these Regulations.

3. Process may be served upon the Commissioner by leaving with him or any person designated by him, duplicate copies of such citations.

4. In the event that such notice of citation is served upon the Commissioner or one of his designated agents, he shall immediately cause one of the copies thereof to be forwarded to the corporation at its registered office. Any service, so had on the Commissioner, shall be answerable in not more than thirty (30) days.

5. The Commissioner shall keep a record of all citations served upon him under this Regulation, and shall

record therein the time of such service and his action with respect thereto.

(3) The written application for a wholesaler's, retail dealer's, or retail consumption dealer's license shall be a permanent record which the licensee must maintain current as required by Section 560-2-3-.12 of these Regulations. Failure to maintain a current license application as required by Section 560-2-3-.12 shall be grounds for revocation of the same.

(4) The state license issued shall be valid only for the calendar year indicated thereon. A licensee that desires to continue in business during the next or subsequent calendar year must make a new application for such year on or before November 1 of the preceding year. No state license may be transferred from one person to another. The Commissioner may in his discretion grant a transfer of license from one location to another location within the same local regulatory jurisdiction provided authority for such transfer has been granted by the local governing authority. Any untrue, misleading, or omitted statement or information contained in such application shall be cause for the denial thereof and, if any license has been granted, shall be cause for the revocation of same. The failure of any applicant, or failure of any person, firm, corporation or organization having any interest in any operation for which an application has been submitted, to meet any obligations imposed by the tax laws of the State of Georgia shall be grounds for denial of the license, permit or registration for which application is made.

(5) The Commissioner may in his discretion require a Personnel Statement of any employee of any licensed establishment for licensing purposes.

(6) When contrary to the public interest and welfare, no license to sell beverage alcohol of any kind shall be issued by the State Revenue Commissioner to:

(a) any person as determined by the Commissioner, by reason of such person's business experience, financial standing, trade associations, personal associations, records of arrests, or reputation in any community in which he has resided, who is not likely to maintain the operation for which he is seeking a license in conformity with federal, state or local laws;

(b) any person who has been convicted under any federal, state or local law of any felony involving moral turpitude; or

(c) any person who has been convicted under any federal, state or local law of a misdemeanor, particularly, but not limited to, those involving beverage alcohol, gambling, or tax law violations, if such conviction tends to indicate that the applicant will not maintain the operation for which he is seeking a license in conformity with federal, state, or local laws.

(7) If the Commissioner has reason to believe that the applicant is not entitled to the license for which he has applied, he shall notify the applicant thereof, and upon request by the applicant, afford him due notice and opportunity for hearing on the application. If the Commissioner, after affording such notice an opportunity for hearing, finds the applicant is not entitled to a license

hereunder, the applicant shall be advised in writing of the findings upon which such denial is based.

(8) The Commissioner may decline to issue a state license to a person for the operation of a place of business when any person having any interest in the operation of such place of business or control over such place of business does not meet the same character requirements as herein set forth for the licensee.

(9) In the event any license application is finally denied, no subsequent application by the same person for a license to sell beverage alcohol shall be considered until the expiration of two years from the date of the final order of denial.

(10) Required statements or information disclosed on forms furnished by the Commissioner which the Commissioner is unable to verify or from which the Commissioner is not able to adequately conduct a full investigation of an applicant or a place of business due to foreign background, ties or interest or for any reason beyond the Commissioner's control, shall be, in addition to all other grounds, cause for denial of any license, and if any license has been granted, shall be cause for revocation of same. Willful failure to furnish the Department with any of the information required by these Regulations or by law, or as the Commissioner or his agents may from time to time require, shall constitute grounds for denial of a license.

APPENDIX XX

Georgia Department of Revenue Administrative Rule No. 560-2-2-.28 Violations; Unlawful Activities.

(1) Any person holding any license, permit, or registration issued pursuant to the Act or any employee or agent of such person who violates any provision of the Act or Regulations, or directs, consents to, permits, or acquiesces in such violation, either directly or indirectly shall, by such conduct, subject the license to suspension or revocation. For purposes of administering and enforcing the Act and these Regulations, any act committed by an employee, agent or representative of a licensee shall be deemed to be an act of such licensee.

(2) It shall be a violation of the Act and these Regulations for any licensee, permittee or registrant to permit any person to engage in any activity on the premises for which the license is issued or within the place of business, which is in violation of the laws or regulations of any federal, state, county or municipal governing authority or regulatory agency. With respect to any such activity, it shall be rebuttably presumed that the same was done with the knowledge or consent of the licensee; provided however, that such presumption may be rebutted only by evidence which precludes every other reasonable hypothesis save that such licensee did not know, assist or aid in such occurrence, or in the exercise of full diligence could not have discovered or prevented such activity.

APPENDIX YY

Georgia Department of Revenue Administrative Rule No. 560-2-2-.29 Failure to Comply with Tax Laws.

(1) No application for a license to sell beverage alcohol will be considered so long as such applicant, person, form or corporation holding an interest in the business for which application is made, has failed to meet any obligations imposed by any tax law of the State of Georgia.

(2) The failure of any licensee, permittee or registrant, or person, firm, or corporation holding an interest in the business for which the license is issued to meet any obligations imposed by any tax law of the State of Georgia shall be grounds for suspension or revocation of such license, permit, or registration.

APPENDIX ZZ

Georgia Department of Revenue Administrative Rule No. 560-2-3-.01 Producer. Amended. "Producer" shall mean a manufacturer, distiller, processor, rectifier, or bottler of distilled spirits. It shall also mean an importer engaged in importing into the United States, if the Commissioner is satisfied that he can, through such importer, effectively regulate the quality and purity of distilled spirits to be sold within the State of Georgia.

APPENDIX AAA

Georgia Department of Revenue Administrative Rule No. 560-2-3-.03 Registered Producer. Amended. "Registered producer" shall mean a producer who has no distillery, factory or plant in Georgia but is registered with the Commissioner pursuant to Section 560-2-3-.22 of these Regulations.

APPENDIX BBB

Georgia Department of Revenue Administrative Rule No. 560-2-3-.10 Bottles, Cans or Containers without Tax Stamps. Amended. Every bottle, can or container containing or having recently contained any distilled spirits which does not have affixed thereto a stamp showing full payment of the tax on the contents thereof shall be prima facie illegal and contraband unless and until it can be conclusively shown that the same when discovered was being transported by a licensed common carrier from a point outside Georgia in the normal course of a producer's business.

APPENDIX CCC

Georgia Department of Revenue Administrative Rule No. 560-2-3-.22 Registration of Producers, Sellers, Joint Registrants and Brands; Registration Fees; Additional Brand Registrations. No person shall be a registered producer unless and until he shall have made application therefor to the Commissioner, secured from the Commissioner approval thereof and all his brands of distilled spirits to be shipped into Georgia, and met the requirements for a license and bond as provided in Section 560-2-3-.23 of these Regulations. Any person who is not a producer but wishes to purchase distilled spirits from a producer for resale to licensed Georgia wholesalers may apply for registration and licensing jointly with such producer as a "joint registrant." Each application for registration shall be accompanied by a registration fee in the sum of one hundred dollars ($100) annually, which shall include the permit fees for one resident representative of the producer, one resident representative of a joint registrant, and the registration fees for not over ten brands. Any brand registration shall be on such conditions as the Commissioner may impose. No producer shall present for registration at any one time more than ten brands of distilled spirits. The registration fee for each additional brand of distilled spirits registered by a producer in excess of ten registered by him shall be ten dollars ($10) annually.

APPENDIX DDD

Georgia Department of Revenue Administrative Rule No. 560-2-3-.30 Arrival; Tax Stamp Inspection. Shipments of distilled spirits and alcohol shall be received at the designated warehouse as the property of the registered producer originating the shipment. Upon arrival, the resident representative of the producer shall inspect such shipment and immediately notify the Commissioner if tax stamps have not been properly affixed to all containers.

No. 93-1140 (H)

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Petitioner,

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Respondents.

On Petition for Writ of Certiorari to the Supreme Court of Georgia

SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

MORTON SIEGEL
Counsel of Record
SIEGEL, MOSES & SCHOENSTADT & WEBSTER, P.C.
One Illinois Center
111 East Wacker Drive
Suite 2800
Chicago, Illinois 60601-4798
(312) 658-2000

JOHN L. TAYLOR, JR.
CELESTE McCOLLOUGH
MATTHEW L. HESS
JEFFERY T. COLEMAN
VINCENT, CHOREY, TAYLOR & FEIL
A Professional Corporation
The Lenox Building, Suite 1700
3399 Peachtree Road, N.E.
Atlanta, Georgia 30326
(404) 841-3200

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On Petition for Writ of Certiorari to the Supreme Court of Georgia

---

SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Pursuant to United States Supreme Court Rule 15.7, the Petitioner, James B. Beam Distilling Co. (hereinafter sometimes referred to as "Beam"), respectfully submits the within Supplemental Brief in the above-styled case (hereinafter sometimes referred to as the "*Beam* case" or "*Beam*").

IN LIGHT OF THIS COURT'S DECISION IN *REICH v. COLLINS*, THE COURT SHOULD GRANT BEAM'S PETITION FOR WRIT OF CERTIORARI; ISSUE AN ORDER OF SUMMARY DISPOSITION ON THE MERITS; AND REVERSE AND REMAND *BEAM* FOR THE PROVISION OF MEANINGFUL BACKWARD-LOOKING RELIEF CONSISTENT WITH DUE PROCESS AND THE DECISIONS OF THIS COURT.

On December 6, 1994, this Court issued its unanimous decision in *Reich v. Collins*, —— U.S. ——, —— S. Ct. ——, 1994 WL 675214 (Docket No. 93-908) (*"Reich"*), in which the Court reversed the decision of the Georgia Supreme Court and remanded the case *"for the provision of meaningful backward-looking relief . . . consistent with due process and our McKesson line of cases." Id.* at WL p. 5 (final paragraph) (quoting *Harper v. Virginia Dep't of Taxation*, 590 U.S. ——, 113 S. Ct. 2510 (1993), and *McKesson Corp. v. Division of Alcoholic Beverages and Tobacco, Dep't of Business Regulation of Florida*, 496 U.S. 18, 110 S. Ct. 2238 (1990); citing *Carpenter v. Shaw*, 280 U.S. 363, 50 S. Ct. 121 (1930); citations and quotation marks omitted; emphasis supplied). The Court has scheduled *Beam* for conference on December 9, 1994. The Court may have been holding the Petition in *Beam* until its decision in *Reich*, for the two cases are companion cases involving the same issues against the same respondents.

Beam requests that this Court grant it the same relief that the Court granted in *Reich*. The Georgia Supreme Court issued its latest decisions in *Reich* and *Beam* on the same day; based its latest opinions in the two cases in very large part on the same erroneous grounds; relied in *Reich* on its holding in *Beam*; and cross-referenced each case, one with the other. Using the same arguments and the same post hoc manipulation of the same taxpayer remedies (namely, Georgia's Tax Refund Statute, O.C.G.A. § 48-2-35)—in what this Court has described as an unfair "bait and switch," *Reich*, at WL p. 3—the State

of Georgia deprived state taxpayers in *Reich* and in *Beam* of their due process rights to a clear and certain remedy for the exaction of unconstitutional taxes and, further, of their due process rights to meaningful, backward looking relief, that is, to a recovery of the unconstitutionally collected taxes. *See id.* at WL p. 2 (" '[A] denial by a state court of a recovery of taxes exacted in violation of the laws or Constitution of the United States by compulsion is itself in contravention of the Fourteenth Amendment,' . . . the sovereign immunity States traditionally enjoy in their own courts notwithstanding." (quoting *Carpenter*, 280 U.S. at 369)).

In its earlier briefing in the instant case as well as in its *amicus curiae* brief in *Reich*, Beam has shown this Court that its case is indistinguishable from *Reich*. If this Court merely vacates the Georgia Supreme Court decision in *Beam* and remands the case without direction, the history of these cases has shown that the Respondents and the Georgia courts will use any remedial discretion this Court leaves them, or appears to leave them, to continue to manipulate the relief to which Beam is entitled and to prolong this litigation. That is precisely what happened in *Reich* when *Reich* was first remanded by this Court to the Georgia Supreme Court in light of *Harper v. Virginia*.

For these reasons and to put an end to the solid decade Beam has spent in litigation over this matter, Beam respectfully suggests that the Court dispose of *Beam* in the same way it disposed of *Reich*. The Court should grant Beam's Petition; should reverse the Georgia Supreme Court in a summary disposition on the merits, by a per curiam opinion or otherwise; and should remand *Beam*, not for mere reconsideration, but expressly and specifically for the same relief as granted in *Reich*: *"for the provision of meaningful backward-looking relief . . . consistent with due process and our McKesson line of cases."* *Id.* at WL p. 5 (emphasis supplied). *See also* United States Su-

preme Court Rule 16.1 ("The order may be a summary disposition on the merits."); *Von Cleef v. New Jersey*, 395 U.S. 814, 89 S. Ct. 2051 (1969); *Keney v. New York*, 388 U.S. 440, 87 S. Ct. 2091 (1967); *Allison v. United States*, 386 U.S. 13, 87 S. Ct. 874 (1967) (case remanded with instructions); *General Atomic Co. v. Felter*, 436 U.S. 493, 98 S. Ct. 1939, 1941 (1978) ("[A] litigant who . . . has obtained judgment in this Court after a lengthy process of litigation, involving several layers of courts, should not be required to go through that entire process again to obtain execution of the judgment of this Court."). After the Court's unanimous decisions in *Reich* and *McKesson*, the relief to which Beam is entitled is clear. Finally, the Court's treatment of the *Reich* case obviates the need for oral argument or further briefing in *Beam*.

CONCLUSION

For all the foregoing reasons and all the reasons stated in Beam's earlier briefing in this case and its *amicus curiae* brief in *Reich*, Beam respectfully requests that and submits that the Court should grant Beam's Petition for Writ of Certiorari, issue an order of summary disposition on the merits, and reverse and remand *Beam* to the Georgia Supreme Court with instructions requiring the provision of meaningful backward-looking relief consistent with due process and the Court's *McKesson*, *Harper*, and *Reich* line of cases.

Respectfully submitted,

MORTON SIEGEL
Counsel of Record
SIEGEL, MOSES & SCHOENSTADT
& WEBSTER, P.C.
One Illinois Center
111 East Wacker Drive
Suite 2800
Chicago, Illinois 60601-4798
(312) 658-2000

JOHN L. TAYLOR, JR.
CELESTE MCCOLLOUGH
MATTHEW L. HESS
JEFFERY T. COLEMAN
VINCENT, CHOREY, TAYLOR
& FEIL
A Professional Corporation
The Lenox Building, Suite 1700
3399 Peachtree Road, N.E.
Atlanta, Georgia 30326
(404) 841-3200

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REPLY TO PETITIONER'S SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

DAVID A. RUNNION
Senior Assistant Attorney General
(Counsel of Record for Respondents)

MICHAEL J. BOWERS
Attorney General

DANIEL M. FORMBY
Senior Assistant Attorney General

Attorneys for Respondents

Georgia Department of Law
132 State Judicial Building
40 Capitol Square, S.W.
Atlanta, Georgia 30334-1300
(404) 656-3340

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OR CALL COLLECT (402) 342-2831

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REPLY TO PETITIONER'S SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Pursuant to United States Supreme Court Rule 15-7, Respondents, State of Georgia, *et al.*, respectfully submit this Brief in reply to Petitioner's Supplemental Brief in Support of Petition for Writ of Certiorari, which counsel for Respondents received by facsimile about 3:00 p.m. on December 8, 1994. In light of the fact that this case is scheduled for a conference on December 9, 1994, Respondents are unable to have this Brief printed in time for submission to the Court prior to its conference; however,

Respondents will have the Brief promptly printed and submitted in printed form as soon as possible.

THE INSTANT CASE HAS SIGNIFICANT DIFFERENCES FROM, AND IS NOT CONTROLLED BY, THIS COURT'S RECENT DECISION IN *REICH v. COLLINS*

In its Supplemental Brief, Petitioner ("Beam") inappropriately requests the extraordinary action of summary disposition on the merits of the instant case at the petition for certiorari stage. The State of Georgia respectfully submits that such a request is without merit, is completely unnecessary, and lacks a sufficient factual or legal predicate for serious consideration. The realistic options for consideration by the Court in the instant *Beam* case are the denial of certiorari (on, *inter alia*, the basis of an adequate and independent state ground for the decision below); the remanding of the case for further consideration in light of the Court's decision in *Reich v. Collins*, Docket No. 93-908, on December 6, 1994; or a consideration of the instant case on the merits with full briefing and oral argument.

Even a casual review of the decision by the Georgia Supreme Court in the instant case, reported at 263 Ga. 609, 437 S.E.2d 782 (1993), and the Georgia Supreme Court's decision in the *Reich* case, reported at 263 Ga. 602, 437 S.E.2d 320 (1993), shows that there are important differences between the two cases. First, the Georgia Supreme Court did not rule in the instant case that Georgia's general refund statute, O.C.G.A. § 48-2-35, did not apply to Beam. In fact, the Georgia Supreme Court assumed *arguendo* that such statute did apply to Beam, as Beam was asserting. Next, the legal incidence of the alcohol tax in question, as distinguished from the income

tax involved in the *Reich* case, was upon Georgia wholesalers, and Beam (a manufacturer) acted, in effect, as the State's collection agent in collecting and remitting that tax.

Also, as distinguished from the Georgia Supreme Court's new interpretation of the refund statute in *Reich*, in the instant *Beam* case the Georgia Supreme Court considered only well established, preexisting state law when determining whether or not Beam had standing to obtain a refund of taxes which its wholesalers paid to Beam to satisfy their own tax liability. The Georgia Supreme Court's ruling in the instant case not only has a fair and substantial basis under preexisting Georgia law, but the exclusive and well established line of authority on point under § 48-2-35 made such standing requirement clear. *See Eimco BSP Services Co. v. Chilivis*, 241 Ga. 263, 268, 244 S.E.2d 829 (1978); *Blackmon v. Georgia Independent Oilmen's Ass'n*, 129 Ga. App. 171, 174, 198 S.E.2d 896, 900 (1973); *Blackmon v. Premium Oil Stations, Inc.*, 129 Ga. App. 169, 170, 198 S.E.2d 900, 902 (1973). *See also Atlanta Americana Motor Hotel Corp. v. Undercofler*, 222 Ga. 295, 149 S.E.2d 691 (1966).

That Georgia rule of standing is similar to the rule under federal tax refund statutes, upon which § 48-2-35 was modeled. *See Hawes v. Bigbie*, 123 Ga. App. 122, 123, 179 S.E.2d 660, 661-62 (1970) and decisions under federal refund statutes, *e.g., United States v. Jefferson Electric Mfg. Co.*, 291 U.S. 386, 400, 402-03 (1934) ("We cannot assent to the view that a court may give a judgment awarding the taxpayer a refund without inquiring whether he has borne the burden of the tax or has reimbursed himself by collecting it from the purchaser"); *Travel Industries of Kansas, Inc. v. United States*, 425 F.2d 1297, 1300 (10th Cir.

1970) (stating that taxpayer's argument that statutory tax refund suits do not involve equitable considerations "has no authoritative support of which we are aware," and refusing a refund which would be a windfall to plaintiff); *Sharp & Dohme, Inc. v. United States*, 144 F.2d 456, 458-59 (3d Cir. 1944) (common law rule is that plaintiff who collected the taxes from another and did not bear the burden of the taxes lacks standing to maintain an action for refund); *Lit v. United States*, 18 F.Supp. 435, 439 (E.D. Pa. 1937) (refund action is governed by equitable principles). *See also Atchison, Topeka & Sante Fe Ry. v. Lennen*, 732 F.2d 1495, 1506-07 (10th Cir. 1984) (denying on equitable grounds a refund under state law where the taxes were paid without protest and the government had already expended the revenues).

In the instant context, Georgia's well established standing bar is entitled to deference, because the procedural bar serves legitimate state interests and does not preclude a recovery by a seller for taxes absorbed by the seller, but only for taxes reimbursed to the seller by his ultimately liable purchaser (the real taxpayer in interest) — thus preventing a double recovery by the seller of the taxes *qua* taxes.

For the above reasons alone, the *Beam* and *Reich* cases are different. However, there are other differences, even with regard to due process issues, because of the differences between certain predeprivation remedies available to alcohol taxpayers and others available to income taxpayers. Further, this Court expressly declined in its *Reich* decision to reach or to resolve any due process issue regarding the adequacy of Georgia's predeprivation remedies.

Therefore, Beam is simply incorrect in asserting that this Court's *Reich* decision disposes of the instant case as a matter of "summary" judgment.

CONCLUSION

There is no urgency or other extraordinary consideration which requires a summary disposition on the merits of the instant case. Since there are important factual and legal differences between the instant case and the *Reich* case, there is no merit to Petitioner's request for such a summary disposition. Respondents submit that the petition for certiorari should be denied, for all of the reasons set out in their "Op. Cert." Brief. If the Court decides not to deny the petition, however, the case should be remanded, or scheduled for briefing and argument on the merits.

Respectfully submitted,

DAVID A. RUNNION
Senior Assistant Attorney General
(Counsel of Record for
Respondents)

MICHAEL J. BOWERS
Attorney General

DANIEL M. FORMBY
Senior Assistant Attorney General

Attorneys for Respondents

Georgia Department of Law
132 State Judicial Building
40 Capitol Square, S.W.
Atlanta, Georgia 30334-1300
(404) 656-3340